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MAKING SENSE OF THE LIONEL TATE CASE

MICHAEL J. DALE*

INTRODUCTION

Lionel Tate was released from the Broward County Jail in Fort Lauderdale, Florida on January 27, 2004 after serving three years in the State's adult prison system. Two days later, on January 29, the youngster, just two days short of his seventeenth birthday, pled guilty in a Broward courtroom to second-degree murder in the death of a six-year old playmate, Tiffany Eunick. In exchange for that plea and the three years he already served in Florida's adult correctional system, Tate was placed on house arrest for one year, and then obligated to complete ten years of probation.¹ The plea agreement was identical to the one initially offered to Tate some three years earlier when he was twelve years of age. His initial failure to take that plea resulted in his removal from juvenile court jurisdiction, indictment by a grand jury, a criminal trial and a conviction as an adult for first degree murder, resulting in life imprisonment without parole. The media reported his conviction as the youngest child ever sentenced to life in prison in the United States.²

Tate's release came as a result of an appellate ruling by Florida's Fourth District Court of Appeal on December 10, 2003, in which the court held that a competency hearing should have been ordered by the trial court when Tate initially rejected the plea offer, as well as, at a post-trial hearing.³

The youngster's pro-wrestling defense, his incarceration for life without parole, and the subsequent appellate reversal, all generated national and even international attention.⁴ More significantly, and together with other notori-

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1. Paula McMahon & Jon Burnstein, *State Offers Tate Same Deal He Rejected Before*, SUN-SENTINEL (Ft. Lauderdale), Dec. 26, 2003, <http://www.sunherald.com/mld/sunherald/news/nation/7577352.htm>.

2. *Id.*; Manuel Roig-Franzia, *Deal Would Free Youth Who Killed 6-Year-Old*, WASHINGTON POST, Dec. 30, 2003 at A03, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A397672003Dec29¬Found=true>; Jill Barton, *Teen in 'Wrestling Death' Ordered Free*, ASSOCIATED PRESS, Jan. 26, 2004, <http://www.guardian.co.uk/us/latest/story/0,1282,-3671841,00.html>.

3. Tate v. State, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003).

4. See *Teen offered plea bargain; Florida boy tried as an adult for murder at age 12 could be out of prison next month*, TORONTO STAR, Dec. 27, 2003, at A17; Nicholas Wapshott, *Youngest 'Lifer' Wins Freedom*, LONDON TIMES, Jan. 2, 2004, http://www.heraldsun.news.com.au/common/story_page/0,5478,8308508^401,00.html (last visited Mar. 27, 2004); Duncan Campbell, *Parole for Youth Given Life Jail Sentence at 13*, GUARDIAN, Jan. 27, 2004, at 19, available at <http://www.guardian.co.uk/usa/story/0,12271,1132050,00.html>; *Juvenile*

ous cases involving young teenagers charged with serious offenses,⁵ the Tate case has generated discussion about a series of issues arising from the practice in the United States of charging young juveniles in adult criminal courts.⁶

The issues the case raises are varied and complex. For example, at what age should teenagers be charged as adults? Does conviction of young teenagers in adult criminal court serve any deterrent purpose? Do juveniles incarcerated in the adult criminal justice system recidivate at a higher rate than similar youth in the juvenile justice system? What are conditions and services like in the adult prison system? Why are minority children disproportionately represented in the adult criminal justice system? Are juveniles competent to stand trial in the adult court and/or aid in their defense? Is the juvenile court effective in rehabilitating juveniles? Should rehabilitation be an issue when a juvenile is charged with a very serious offense? What role should retribution play in a case where a juvenile is adjudicated to have committed a very serious criminal offense? Should prosecutors have unfettered discretion in charging young defendants as adults? Should the felony murder doctrine apply to juvenile defendants? At whose direction does a defense lawyer representing a very young defendant, act—the child client or the parents?

This edition of the *Nova Law Review* contains articles focusing on several of the major issues raised by the Tate case. In the first article, *Abolish-*

killer freed, AUSTRALIAN, Jan. 28, 2004, at 8; *Teen who killed friend is released from prison*, INT'L HERALD-TRIBUNE, Jan. 28, 2004, at 5; *Killer teen set free*, OTTAWA SUN, Jan. 30, 2004 at 22.

5. See Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager*, 28 NOVA L. REV. 507 (2004) (discussing the Florida cases of *Tate* and *Brazill*; and also discussing the case of fifteen-year-old Jonathan Miller from Georgia convicted of felony murder and sentenced to life in prison with the possibility of parole in Fourteen years); see also Jason Cato, *What Does Teenager's Release Mean for Chester Case?*, ROCKY HILL HERALD, Jan. 28, 2004, <http://www.heraldonline.com/local/story/3281217p-2931601c.html> (last visited Mar. 27, 2004) (comparing *Tate* to the case of Fourteen-year-old South Carolina boy charged with killing his grandparents).

6. See Deborah Sharp, *Neither Family Happy with Teen's Plea Deal*, USA TODAY, Jan. 6, 2004, http://www.keepmedia.com/ShowItemDetails.do?item_id=371500&extID=10026 (last visited Mar. 27, 2004); Noah Bierman, *Freedom No Free ass for Tate*, MIAMI HERALD, Jan. 25, 2004, <http://www.miami.com/mld/miamiherald/news/7783801.htm> (last visited Mar. 27, 2004). The public outrage with youth crime is not new. In 1978 fifteen-year-old Willie Basket was convicted for three subway murders and sentenced to the State Division for Youth until his twenty-first birthday. New York Governor Hugh Carey exploded and sought new legislation to allow children as young as thirteen to be tried as adults. FOX BUTTERFIELD, ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE 226–27 (Alfred A. Knopf 1st ed., 1995); PAUL A. STRASBURG, VIOLENT DELINQUENTS 1–2 (1978).

ing the Use of the Felony-Murder Rule When the Defendant is a Teenager, Northwestern University Clinical Professor Steven A. Drizin and Northwestern University School of Law graduate Alison McGowen Keegan argue forcefully that, in light of the child's lack of ability or incapacity to form the requisite criminal intent to commit the underlying crime in the child abuse felony murder case—the murder—the prosecutor ought not be allowed to avoid proving the underlying intent in order to get a conviction. In the second article, *A Child and A Choice*, Lionel Tate's trial counsel, James Lewis, discusses the ethical question he faced—how a lawyer may go about representing a young client whose competence may be questioned; how that lawyer deals with the child's parent; and, as a result, from whom does the lawyer take his guidance in making the decision to accept or reject a plea offer.⁷

The third article, *Child's Play No Longer: Children Charged and Tried as Adults in Florida—Ending up in Prison for Life Without Parole*, authored by Lionel Tate's appellate counsel, Richard Rosenbaum, is enlightening in two respects. First, he adds more information about what actually occurred in the Tate case. Second, together with commentary on competence and separation of powers, he expands upon the various constitutional arguments, including due process, equal protection and privacy, which were unsuccessful before the District Court of Appeal. In the fourth article, *Tate v. State: Highlighting the Need for a Mandatory Competency Hearing*, Nova law student Steven Bell argues that mandatory competency hearings are needed for children under the age of sixteen who are charged with felonies in either juvenile or adult court.

In order to put all of these articles in perspective, it is first important to understand just what happened in the Tate case and what the Florida Intermediate Appellate Court decided. This introduction will summarize the holding in the case and describe the various issues raised by the case and those left unresolved by the opinion, including the subjects dealt with in the Drizin/ Keegan, Lewis, Rosenbaum, and Bell articles.

THE TATE CASE

Twelve-year old Lionel Tate was indicted by a grand jury and convicted of the first degree murder of six-year old Tiffany Eunick, in a six day trial between January 16 and 19, 1999.⁸ The verdict included charges of both

7. See Jim Lewis, *A Child and a Choice*, 28 NOVA L. R. 479 (2004).

8. *Tate v. State*, 864 So. 2d 44, 44 (Fla. 4th Dist. Ct. App. 2003). Added to the oddities of the case is the fact that Kenneth Padowitz, the prosecutor who made the plea offer to Tate in his initial murder trial, represented the victim's mother, Deweese Eunick-Paul, after going into private practice. After the first appeal, Tate's mother, Kathleen Grosssett-Tate, was repre-

felony murder predicated upon the commission of aggravated child abuse and premeditated murder.⁹ The appellate court found that the evidence clearly showed that the child had been brutally slain and that she had “as many as thirty-five injuries, including a fractured skull, brain contusions, twenty plus bruises, a rib fracture, injuries to her kidneys and pancreas, and a portion of her liver detached.”¹⁰ The appellate court also explained that none of the experts believed that the injuries resulted from “play fighting,” a probable reference to the wrestling defense presented by the defendant.¹¹ Although Tate raised many issues before the appellate court in his appellate brief,¹² the court ruled solely in Tate’s favor on the issue of competence—that the denial of the defense lawyer’s post-trial request to have the boy evaluated, as well as the court’s failure to *sua sponte* order a pre-trial competency evaluation when Tate rejected the original juvenile court plea, constituted a violation of Tate’s due process rights.¹³

At the post-trial stage, Tate was represented by separate counsel, Richard Rosenbaum, the lawyer who also ultimately represented Tate on his successful appeal.¹⁴ In the post-trial hearing, in addition to moving for a new trial, Rosenbaum sought an evidentiary hearing to challenge whether the pre-trial plea negotiations were adequately explained to the child. Rosenbaum sought a competency evaluation and hearing on the grounds that the child neither knew nor understood the consequences preceding the trial and that he was unable to assist his counsel before and during trial.¹⁵ In addition, Rosenbaum argued to the court that the child was, at the time of the post-trial hearing, not competent to understand the implications of why he needed to waive the attorney-client privilege.¹⁶ In fact, James Lewis wished to testify in support of the request for a post-trial competency hearing but was faced with the inability to do so without waiver of the attorney-client privilege by Tate.¹⁷ According to the appellate court, after Tate conferred with his

sent by her own counsel, Henry Hunter from Tallahassee. John Thor-Dahlburg, *Boy who received life without Parole to be freed soon*, L.A. TIMES, Jan. 26, 2004, at 8, available at <http://www.contracostatimes.com/mld/cctimes/news/7798061.htm>.

9. Tate, 864 So. 2d at 47.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 50.

14. Tate, 864 So. 2d at 46; see Richard L. Rosenbaum, *Child’s Play No Longer: Children Charged and Tried as Adults in Florida—Ending up in Prison for Life Without Parole*, 28 NOVA L. REV. 485 (2004).

15. Tate, 864 So. 2d at 47.

16. *Id.* at 48.

17. Tate v. State, 864 So. 2d 44, 48 (Fla. 4th Dist. Ct. App. 2003).

mother, he did not agree to the proposed waiver of the attorney-client privilege.¹⁸ The court noted that the child apparently simply followed his mother's instructions not to waive the privilege despite both lawyers' view that it was in the child's best interest.¹⁹ Lewis wanted to tell the court "what led him to believe that Tate was not competent during trial."²⁰ Subsequently, the trial court denied the post-trial motion for a post-trial evaluation and hearing.²¹ Ironically, prior to ruling against the child, the trial court commented that "I am also convinced that if I deny your hearing at this particular point, that I would get ordered by the Fourth District Court of Appeals [sic] to have such a hearing."²²

The appellate court posed the question before it this way:

whether, due to his extremely young age and lack of previous exposure to the judicial system, a competency evaluation was constitutionally mandated to determine whether Tate had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as factual, understanding of the proceedings against him.²³

The appellate court found that "[t]he record reflects that questions regarding Tate's competency were not lurking subtly in the background, but were readily apparent. . . ."²⁴ The court noted that the child had an IQ of 90 or 91, placing him in the lower twenty-five percent of children of his age, and that he had significant mental delays. Thus, the appeals court concluded that the trial court committed error by failing to *sua sponte* order a competency hearing pre-trial and, nonetheless, to deny the post-trial request for the competency hearing.²⁵ In coming to its conclusion, the Fourth District Court of Appeal relied upon the United States Supreme Court opinion in *Dusky v. United States*, which established the test for the determination of competency: "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."²⁶ Finding that a competency hearing should have been ordered, the court then

18. *Id.*

19. *Id.* at 48–49.

20. *Id.* at 49.

21. *Id.* at 48, 49.

22. *Tate*, 864 So. 2d. at 47.

23. *Id.* at 48.

24. *Id.* at 50.

25. *Id.*

26. 362 U.S. 402, 402 (1960); *see also* *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

remanded, indicating the child was entitled to a new trial because conducting a hearing at the appellate stage, to determine the present competency of the maturing adolescent, failed to adequately retroactively protect Tate's rights.²⁷

The court rejected all other appellate arguments made by Tate's lawyer. In response to the argument that the Legislature did not mean to prosecute children as caretakers for the crime of aggravated child abuse, the appellate court found that the statute was not void for vagueness, and that a clear reading of the statute allowed it to be applied to the conduct of a non-caretaker child against another child.²⁸ The court noted that it is up to the Legislature to reexamine the language of the statute and determine whether it intended such a result. The court went on to find that there was no equal protection or due process violation because the child was being treated more harshly than older adolescents, premised upon the notion that there is no absolute right for juveniles to be treated in a separate system for juvenile offenders, a concept recognized by a number of jurisdictions.²⁹ The court also rejected the equal protection argument that some juveniles are charged and convicted as adults while others are dealt with in the juvenile system on the basis of prosecutorial discretion.³⁰ In making its ruling, the court relied upon its earlier rejection of the same argument in the notorious Florida criminal matter, the Nathaniel Brazill case.³¹ Brazill, thirteen, had been convicted of shooting and killing his middle school teacher, Barry Grunow, on May 26, 2000.³²

In addition, the court in the Tate case rejected a separation of powers argument made by Tate, who claimed that the State had unlawfully delegated its powers by allowing the prosecutor to define the crimes and the fix penalties by seeking indictment for children under fourteen.³³ The court rejected an argument that Tate had a right to a transfer hearing under *Kent v. United States*,³⁴ which had also rejected by the court in *Brazill*.³⁵ The court rejected the argument in the *amicus* brief, whose authors were from the Juvenile Law Center, that a child of his age did not have the adult capacity to form criminal intent, concluding that the Legislature had rejected the common law de-

27. *Tate v. State*, 864 So. 2d 44, 51 (Fla. 4th Dist. Ct. App. 2003).

28. *Id.* at 50–51.

29. *Id.* at 52–53.

30. *Id.* at 52.

31. *Id.* at 52–53 (citing *Brazill v. State*, 845 So. 2d 282, 289 (Fla. 4th Dist. Ct. App. 2003)).

32. *Brazill*, 845 So. 2d at 285.

33. *Tate*, 864 So. 2d at 53.

34. 383 U.S. 541 (1966).

35. *Tate*, 864 So. 2d at 53 (citing *Brazill*, 845 So. 2d at 288–89).

fense of infancy with a statutory scheme.³⁶ The court rejected Tate's argument about the right to privacy and confidentiality, which he would have had in the juvenile court. The court recognized that in the *Brazill* case there had been a similar argument regarding the right to the rehabilitative aspect of the juvenile court.³⁷ The court in *Tate* rejected this argument on the same ground that there is no statutory or constitutional right to access to the juvenile court system.³⁸ Finally, the court rejected "the argument that a life sentence without the possibility of parole is cruel and unusual punishment on a twelve-year-old child" under the *Florida Constitution* and the *Federal Constitution*.³⁹

PUTTING THE CASE INTO CONTEXT

It is hardly surprising that a case like that of Tate would eventually take place in the State of Florida, involving a very young child convicted of a very serious offense, resulting in incarceration for life. In 2000, Florida led the nation in transfers of juveniles to criminal court.⁴⁰ In the fiscal year, 1994-1995, almost 5,000 juveniles involved in more than 7,000 cases were transferred to the criminal court in Florida.⁴¹ This number constitutes more than ten percent of all juvenile offenders handled through the court system in Florida.⁴² In fact, the figure came close to the total number of residential placement dispositions for juvenile offenders in the Florida programs run by the Department of Juvenile Justice.⁴³ There is evidence that children transferred to the adult criminal court system in Florida were more likely to re-offend than those kept in the juvenile court system for similar offenses and

36. *Id.* Organizations and law school professors working in the juvenile justice field filed two *amicus curiae* briefs. The attorneys from the Juvenile Law Center of Philadelphia who prepared the competence-related brief were Robert G. Schwartz, Marsha L. Levick and Lourdes M. Rosado.

37. *Brazill*, 825 So. 2d at 288.

38. *Tate v. State*, 864 So. 2d 44, 53-54 (Fla. 4th Dist. Ct. App. 2003).

39. *Id.* at 54.

40. FLA. DEP'T OF JUVENILE JUSTICE, BUREAU OF DATA AND RESEARCH, A DJJ SUCCESS STORY: TRENDS IN TRANSFER OF JUVENILES TO ADULT CRIMINAL COURT 5 (Jan. 8, 2002) [hereinafter A DJJ Success Story] (describing Florida as "widely recognized as the leader of the transfer experiment").

41. DONNA BISHOP, ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, A STUDY OF JUVENILE TRANSFERS TO CRIMINAL COURT IN FLORIDA, (Aug. 1999), <http://www.ncjrs.org/txtfiles1/fs99113.txt>.

42. *Id.*

43. *Id.*

based upon material race, sex and gender.⁴⁴ Ironically, Florida's Department of Justice has recently said that there is mounting evidence of greater effectiveness of treatment programs for serious offenders in the juvenile justice system.⁴⁵

Florida also possesses a variety of statutory routes for adjudication of juveniles in the adult court, including discretionary judicial waiver, discretionary prosecutorial waiver, known as direct file in Florida, and grand jury indictment for juveniles who have been charged with capital or life felonies.⁴⁶ Whether prosecutorial discretion to try children in adult court in Florida is applied fairly has been the subject of studies, which suggest a lack of regularity in the process.⁴⁷

The expansion of the use of adult court in Florida, including 1994 changes allowing additional discretionary direct file criteria for fourteen and fifteen year olds,⁴⁸ is not all that dissimilar to the practices of other states. In the 1990s, many states changed their juvenile justice statutes to expand the circumstances under which juveniles could be transferred to or filed directly against in adult court.⁴⁹ The causes for the change in legislation are multiple, including perceived increase in juvenile access to drugs, the gun culture, gangs, media perceptions, political advantageousness, and an increase in the

44. DONNA BISHOP & CHARLES FRAZIER, THE CONSEQUENCES OF WAIVER, IN THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin Zimring eds., 2000); DONNA M. BISHOP ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE TRANSFERS TO CRIMINAL COURT STUDY: PHASE I FINAL REPORT, (1998); Donna Bishop, *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQUENCY, 548, 558 (1997); Donna Bishop, *The Transfer of Juveniles to Criminal Court: Does it make a difference?*, 42 CRIME & DELINQUENCY 171 (1996).

45. A DJJ Success Story, *supra* note 40, at 6.

46. *Id.*

47. Vincent Schianaldi & Jason Ziedenberg, Center on Juvenile and Criminal Justice, *The Florida Experiment: An analysis of the Impact of Granting Prosecutors Discretion to Try Juveniles as Adults* 3-4 (2000) (finding that 28% of youth transferred to adult criminal court were charged with violent crimes, and more than half were charged with non-violent property crimes).

48. *Id.*

49. PATRICK GRIFFIN ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS (1998); Marisa Slaten, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 822 (2003); *see also* CHARLES M. PUZZANCHEAR, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1990-1999, (Sept. 2002) (finding that since 1994, cases waived to adult court declined 38%, and represented less than 1% of formally processed delinquency cases); *Guillory v. Superior Court*, 72 P.3d 815, 817 (Cal. 2003) (upholding Proposition 21 providing discretion to prosecutors similar to that available to the prosecutors in the Tate case).

youth population. Perhaps the most significant cause of change in legislation is fear of youth crime, combined with a belief that juvenile courts do not work.⁵⁰ As may be imagined, the perceptions about the effectiveness of the adult criminal justice system in responding to the perceptions about youth crime vary dramatically.⁵¹ According to William J. Bennett and his co-authors in their book *Body Count* in 1996, in which they coined the phrase “super predators” to refer to certain juveniles, the authors said that “despite many legislative efforts aimed at trying more juvenile criminals as adults, not much has happened.”⁵² The authors explained that Americans have been calling for change in the juvenile justice system that would allow law enforcement officials to get a firm grasp on youth criminals. On the other hand, the Sentencing Project, in an article in 2002, made the following statement about the deterrent effect of incarceration of juveniles in adult correctional institutions:

The imposition of adult punishments, far from deterring crime, actually seems to produce an increase in criminal activity in comparison to the result obtained for children retained in the juvenile system. Reliance upon criminal courts and punishment ignores evidence that more effective responses to the problems of crime and violence exist outside the criminal justice system in therapeutic programs. Because there is considerable racial disparity in the assignment of children to adult prosecution, the harshness, ineffectiveness and punishing aspects of transfer from juvenile to adult court is doubly visited on children of color.⁵³

The Sentencing Project article suggests there is evidence of dramatic racial disparity in the transfer and placement of children in the adult criminal justice system. In Florida, African-American youngsters in 2000 constituted about forty percent of the youth population. Yet state-wide they constituted

50. A DJJ Success Story, *supra* note 40, at 5.

51. See JUVENILE JUSTICE: A CENTURY OF CHANGE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Dec. 1999) (supporting the juvenile justice system as a comprehensive and balanced approach to justice).

52. WILLIAM J. BENNETT, ET AL., *THE BODY COUNT* 118 (Simon & Schuster ed., 1996).

53. PATRICIA ALLARD & MALCOM YOUNG, *THE SENTENCING PROJECT COMMENTARY: PROSECUTING JUVENILES IN ADULT COURT: PROSPECTIVE FOR POLICY MAKERS AND PRACTITIONERS* (2002); see also Simon I. Singer & David McDonald, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & SOC'Y REV. 521 (1988); Eric Jensen & Linda Metzger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQUENCY 96 (1994).

fifty-six of the referrals transferred to adult court.⁵⁴ In fact, in Miami-Dade County during the same time period, eighty-five percent of the cases filed in adult courts related to minority youth.⁵⁵ Both the Tate and Brazill case involved children of color. Nothing in either appellate opinion touches on the issue of over-representation of minority children in the adult criminal justice cases.

The issue of competency of juveniles to assist in the defense, of course, was the subject of the ruling by the appellate court in the *Tate* case and raises another significant issue in terms of transferring and trying children in the adult criminal justice system. It is significant that the issue of competence was the subject of one of the two *amicus curiae* briefs filed in the case, in part a Brandeis-like memorandum containing substantial supporting literature.⁵⁶ Competence of young children in the adult criminal court is the subject of important recent articles. The work of Thomas Grisso, Jeffrey Fagan, Elizabeth Scott and Lawrence Steinberg, among others, has raised the consciousness of both the prosecution and defense regarding the capacity of juvenile defendants to aid in their defense.⁵⁷

However, the appellate opinion in *Tate* did not settle the question of whether young children are competent to aid in their defense in adult crimi-

54. Building Blocks for Youth for a Fair and Effective Youth Justice System, State by State Information: Florida, at <http://www.buildingblocksforyouth.org/statebystate/florida.html> (last visited Apr. 3, 2004) (showing Florida's disproportionate minority confinement). See generally DONNA HAMPARIAN & MICHAEL J. LEIBER, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DISPROPORTIONATE CONFINEMENT OF MINORITY STUDENTS IN SECURE FACILITIES (1997).

55. *Id.*

56. Brief for Amici Curiae Center on Children & the Law et al., *Tate v. State*, 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003) (No. 4D01-1306).

57. See Thomas Grisso & Laurence Steinberg, *Juvenile Competence: Can Immaturity Alone Make an Adolescent Incompetent to Stand Trial?* 9 JUV. JUST. UPDATE 2 (2003); Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment*, 33 NEW MEXICO L. REV. 207 (2003) (analyzing immaturity and culpability of juveniles); Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment*, 33 N.M. L. REV. 207 (2003); Elizabeth S. Scott and Lawrence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2002); RICHARD J. BONNIE & THOMAS GRISSO, ADJUDICATIVE COMPETENCE AND YOUTHFUL OFFENDERS, IN YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73, 75 (Thomas Grisso & Robert G. Schwartz eds., 2000); THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 101-05 (1998); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 23 (1997); Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141-42 (1997); Lawrence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 LAW AND HUM. BEHAVIOR 249 (1996).

nal cases. The appellate opinion simply advised trial judges hearing adult criminal cases involving very young defendants that they should be alert to issues of competence, and that they may request *sua sponte* expert advice on the question of the child's competence. What should alert the judge is not described in any doctrine in the opinion. The judge, arguably, is the least likely of the players in a criminal case to have knowledge of the child's competence. Obviously defense counsel should know a great deal about the client's competence. But, so too, should the prosecutor.

THE DRIZIN/KEEGAN, ROSENBAUM, LEWIS, AND BELL ARTICLES

The *amicus curiae* brief filed in the *Tate* appeal on behalf of the appellant, authored by Professor Stephen Drizin and others dealt with the question of felony murder and its application to children and is the subject of the Drizin/Keegan article in this law journal. The article, which urges rejection of felony murder charges as appropriate for young child defendants raises the important question of why the State should be able to convict children of serious criminal charges involving deaths without proving the child intended to kill the victim. Jim Lewis's article focuses on a very serious issue—the relationship among a lawyer, the child client, and the client's parents. While at first glance it would seem obvious that the lawyer's obligation to the client is simple and straightforward, the Rules of Professional Conduct recognize that the duty is to the client regardless of who is paying the bills. The Rules also suggest that when a client is disabled, including children, the lawyer should do what he or she can to represent the client as any other fully capable client. The reality of representation, as Lewis's article demonstrates, is not always so clear. When one is faced with a twelve-year-old client whose competence may be suspect may the lawyer rely upon the judgment of the parent?

Rosenbaum's article both provides the reader with great insight into how the *Tate* case was handled post trial, particularly with regard to the issue of competency, and fleshes out the various constitutional arguments that failed in the appellate court. In order to understand what the future holds for children charged in adult court for serious crimes, it is vital to understand what legal challenges have failed. Bell argues that competency hearings should be mandatory for felonies committed by youths less than sixteen-years-old, in both juvenile and adult court. Mandatory competency hearings should be conducted despite the fact that failure to raise the issue of competence can constitute ineffective assistance of counsel and despite the court's power to order a competency hearing. Rather, because of the evidence that

children less than sixteen lack the “essential characteristics”⁵⁸ to be competent to stand trial, a competency hearing should be required.

CONCLUSION

These four articles start a discussion both in terms of Florida’s application of adult criminal charges and the adult criminal justice process to children who commit very serious offenses and the role of judges, prosecutors and defense counsel in these cases. There has been extensive public outcry concerning the Florida law that allows a twelve-year-old to be sentenced to prison for life without the possibility of parole. Whether or not there will be any response by the Florida Legislature, or other state legislatures, to the increased use of the adult criminal justice system to hold young children accountable, or to the severity of sentences for juveniles, remains to be seen.⁵⁹ Likewise, because the appellate opinion in the *Tate* case obligates judges to inquire as to a juvenile defendant’s competence, but sets no precise age standards, it is unclear how judges, prosecutors and defense lawyers will handle these problems. Although the *Tate* opinion resolves one child’s case, the larger questions of whether children like Tate should be held accountable in adult court and, if so, how we determine whether they are competent to aid in their own defense, remain unanswered.

58. Steven Bell, *Tate v. State: Highlighting the Need for a Mandatory Competency Hearing*, 28 NOVA L. R. 575 (2004).

59. In the Winter of 2004 after Tate’s release, Florida State Senator Steve Geller introduced Senate Bill 530 (“SB 530”) amending the Florida juvenile delinquency statute, Chapter 985 to provide that children fifteen years of age or younger, who have not committed other listed offenses, be eligible for parole in capital offense cases. S. 530, 2004 Reg. Sess. (Fla. 2004), http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=530. However, SB 530 was not enacted. See Beth Reinhard, *Parole denied for kids who get life*, MIAMI HERALD, Apr. 1, 2004, at <http://www.miami.com/mld/miamiherald/news/state/8326125.htm%20on%20April%201,%202004> (last visited Apr. 8, 2004). Senator Walter Campbell filed Senate Bill 1346, a more extensive plan, which would limit the age at which a minor could be sentenced to death, mandates Department of Juvenile Justice commitment of juveniles, who are convicted of offenses punished by death in the adult system. S. 1346, 2004 Reg. Sess. (Fla. 2004), http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=1346.

A CHILD AND A CHOICE

JIM LEWIS*

Your client is twelve-years-old and charged with first degree murder as an adult. It is alleged that, without a weapon, he beat a six-year-old female playmate to death for no apparent reason. When examined by a neuropsychologist, the twelve-year-old defendant tested as immature for his age with a below average I.Q. The state makes what appears to be a lenient plea offer for a second degree murder conviction—three years of prison to be served in a juvenile facility, followed by a period of one year community control (house arrest) and ten years of probation.

The defendant's mother is a police officer and an army veteran who served in Desert Storm. The defendant's father lives out of state and, for all practical purposes, is out of the decision-making loop. The defendant's mother seems to be intelligent, concerned, and totally preoccupied with the best interests of her son.

Who should make the decision as to whether this twelve-year-old defendant should take the plea offer or risk a trial with a possible sentence of life in prison without parole? This article is written making the dangerous assumption that no issues of competency as to the child client exist, or that it has already been determined by the court that the child is competent.

Who makes the decision to roll the dice of a trial or accept a plea bargain? In the adult world the answer is simple—the defendant, the person accused makes the decision, with the benefit of advice from hopefully competent counsel. The issue is not so simple when the defendant is twelve-years-old, intellectually and socially immature for his age, and charged in adult court with the most serious crime known to man—the killing of a child.

Logic would seem to dictate that the parent would be calling the shots on what would probably be the most important decision to be made during the child's lifetime. Would the child be better off if a court-appointed guardian helped make the decision? What if the independent guardian's advice is different than that of the parent? Should the lawyer interject himself more into the decision-making process if he represents a child instead of an adult? Should the lawyer insist a plea be taken in the face of overwhelming physical

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evidence, such as an autopsy detailing the victim's injuries as multiple and severe, even if the parent and child insist his acts were not intentional? Should the lawyer back up this insistence by withdrawing as attorney of record if the parent and child refuse to enter a plea?

The *ABA Model Rules of Professional Conduct* and more specifically, rule 4-1.4(b) of the *Rules Regulating the Florida Bar*, require an attorney to explain matters to a client to the extent reasonably necessary to permit the client to make informed decisions regarding representation.¹ However, when the client is a child, this standard can become impracticable. Furthermore, when the child is twelve-years-old and immature for his age with a below average I.Q., the standard may become impossible. Does the parent then become the decision-maker by default? Parents in our society make nearly every important decision in a twelve-year-old's life. However, it is probably a parent's natural instinct to hide terrible consequences from his or her twelve-year-old in a situation where the child may face a sentence of life in prison. It is analogous to a mother deciding not to inform her terminally ill son that he has brain cancer and may die within a matter of months. It is also a parent's natural instinct to believe that his child is incapable of murder and therefore, not deserving of being locked up for any significant period of time.

Rule 4-1.14(a) of the *Rules Regulating the Florida Bar* provides that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client," even if the normal client-lawyer relationship is impaired because of minority or a mental disability of the client.² Theoretically, a lawyer must place himself between the child and the parent to ensure the decision is the true will of the child, not the parent. It is also important for an attorney representing a child client charged with a serious crime not to blur the professional attorney-client relationship with paternalistic feelings towards the client. It is a natural reaction for an attorney to assume the role of the "protector," grimacing at the thought of his child client serving even one minute locked up in a penal institution. If the attorney allows himself to think "what would I do if this was my child," his advice will likely be clouded by emotion instead of professional judgment.

The rules of professional responsibility do not seem to address the rights of parents to direct representation on behalf of their children, especially in an adult criminal proceeding.³ Generally, it is improper to allow a third party to direct or influence the attorney's exercise of independent judgment or to share confidential information with such person except with

1. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003); R. REGULATING FLA. BAR 4-1.4(b).

2. R. REGULATING FLA. BAR 4-1.14(a) cmt.

3. See R. REGULATING FLA. BAR 4-1.14.

the consent of the client.⁴ The factors to be considered in accepting a plea bargain in a murder case can be very complex. Evaluating the strength of the government's case and understanding legal standards of intentional homicide, felony murder, and accidental or excusable homicide are difficult for educated adults to understand, let alone a twelve-year-old child.

Where a parent consults a lawyer on behalf of a young child, it is inconceivable that a lawyer would not defer to the parent for guidance, or that the parent would not reasonably expect the lawyer to do so.⁵ Further, when a child is incapable of comprehending the situation which requires him to make a life-altering decision, the lawyer is arguably compelled "[t]o consult [with the child client's] parent to determine what course of action might be in the child's best interests, even if the parent is not actually directing the course of the representation."⁶

Despite the absence of authority, an argument can be made that "[i]f parents have the right to direct or influence the lawyer representing their child . . . [it is because of their status] as parents,"⁷ the child's "natural guardians."

Conflicts may arise between the interests of the parents and the child in the course of representing a child charged with a crime in adult court. Parents may make unwise decisions out of personal feelings of guilt or out of devotion to the child, clouding the judgment that may be necessary to weigh the consequences of an adverse verdict in adult court. If an actual conflict does exist with the parent, a guardian-ad-litem should be requested by counsel, with the courts appointing a lawyer or non-lawyer to serve in that capacity.⁸ Guardians cannot enter pleas in criminal court on behalf of a child. If the guardian's opinions differ from those of the natural parent, logic dictates that the child would choose the natural parent's opinion. If the conflict between the guardian ad-litem and the parent escalates, a guardian may petition the court to limit access of a parent to a child client, fearing undue influence. Ultimately, the child must choose the advice he will rely upon in making decisions relating to his case. Rule 1.14(b) of the *Model Rules of Professional Responsibility* provides that a lawyer may seek the appointment of a guardian or take other protective action with respect to a client only "when the lawyer reasonable believes that a client . . . cannot adequately act in the

4. R. REGULATING FLA. BAR 4-1.6.

5. Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 *FORDHAM L. REV.* 1819, 1846 (1996).

6. *Id.*

7. *Id.* at 1847, 1849.

8. *Id.* at 1840-41.

client's own interest."⁹ Does that rule call for the appointment of a guardian simply because the child's decision to proceed to trial, refusing a lenient plea offer, seems unwise? Should a lawyer threaten to withdraw as counsel if his client does not agree with the lawyer's advice? The answer to these questions is clearly, no.

The role of the lawyer representing a child in a criminal proceeding is the same as if the lawyer were representing an adult in a criminal proceeding.¹⁰ Lawyers are "[e]thically obligated to seek the objectives of the case as defined by their clients, whether or not the lawyers think those objectives are sound for the client or for society."¹¹

A lawyer should not seek the appointment of a guardian simply because the lawyer is unhappy with a client's decision.¹² Likewise a threat to withdraw or actually withdrawing as counsel of record on these grounds is itself repugnant. Our entire criminal justice system is based on the presumption of innocence and the client's right to maintain his innocence until proven guilty in a court of law. Instead of seeking the appointment of a guardian, the attorney may choose to have an experienced psychologist to consult with both the child and the parent about plea decisions. But it is the lawyer's ultimate responsibility to make sure the child understands all of the options and to have the child make a voluntary choice, free from any undue pressure from any third party.

The normal objective of representing a criminal client, whether the client is a child or an adult, is to avoid the adverse consequences of a conviction (i.e. prison, criminal record, or other restrictions of the client's life). Some clients however proceed to trial seeking vindication or a finding by a jury or the court that their conduct was not criminal. Some clients place principle, which usually means their belief in their own innocence, over the risk of conviction and punishment. While this may seem unwise, counsel's role is to advise a client, not to make his decision. It is the client who determines the objectives of the representation.¹³ Children's attorneys face a significant dilemma when their view of the child's best interest conflicts with the child's expressed wishes concerning the objectives of representation.¹⁴ Generally, a lawyer is an advocate for his client's preferences in a court pro-

9. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

10. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1424 (1996).

11. *Id.*

12. Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259, 281 (1995).

13. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

14. Ventrell, *supra* note 12, at 280-81.

ceeding, and not what the lawyer believes to be in the child's best interests.¹⁵ When counseling a child client about choices in a criminal proceeding, the child must get the benefit of counsel's independent professional judgment as to the risks of trial, consequences of an adverse verdict, and opportunities for a plea bargain.¹⁶

A parent is often necessary in the attorney-child relationship to bring the child back to reality in making important decisions. It has been my experience that children in the twelve to fifteen age group not only always gravitate toward a choice that has no consequences, but also believe they will win the trial and get to go home immediately. A twelve to fifteen-year-old has limited ability to weigh risks and often believes that destiny or luck is always on his side. The experiences and common sense of the parent may be the only reality check the child can understand. A child client who relates well with his lawyer is apt to think "my lawyer can't lose, he's a great guy." Twelve-year-old children simply do not have enough experience and insight to make rational choices in an adult court setting. No court appointed guardian or team of psychologists can give him that experience or insight.

Marvin R. Ventrell in his 1995 article, Loyola University of Chicago Law Review writes:

[i]f the attorney's view of the child's best interests conflicts with the child's wishes, the lawyer should both consider whether the child's wishes are reasonable and whether the attorney truly knows what is best. Simply disagreeing with a client's directive should not, by itself, cause a dilemma. Attorneys may need to compromise their positions as well and must always remain mindful of their role in the system—a role which requires them to advocate a position, and not to determine the outcome.¹⁷

No client, child or not, should ever be pressured by his lawyer to accept a plea bargain against his will. The court cannot accept a pressured plea even if it's the client's own lawyer who is doing the pressuring.

My twenty-three years as a criminal trial attorney have taught me two important lessons. First, you should never predict the outcome of a criminal trial. The best any lawyer can do is to suggest to his client what he thinks might happen at trial and the likely verdicts. A criminal trial is a dynamic event full of fortune and misfortune. A verdict is often determined by the make up of a jury—and a jury of strangers can do strange things. Second, if you exert too much influence convincing a criminal client to accept a plea bargain you will regret it. The client will blame you when he ultimately vio-

15. *Id.* at 279.

16. *Id.* at 260.

17. *Id.* at 279.

lates probation and goes to prison for a crime he believes he did not commit. You, the lawyer, have ruined his life because you convinced him to take a plea when he believes the case should have gone to trial. On the other hand, if you go to trial in the face of a lenient plea bargain and lose, your client and the world may look at you and ask, "What were you thinking?"

As the Lionel Tate case illustrates, the role of the criminal attorney in representing a young teenager in adult court, charged with a serious crime, is complex. The ultimate decisions must be made by the child client. However, the system is naive if it believes children in this position will not be influenced, or even defer these decisions to the parent. All a lawyer can do is give good advice to the child client and the parent and hope the right decision will become apparent to all.

CHILD'S PLAY NO LONGER: CHILDREN CHARGED AND TRIED AS ADULTS IN FLORIDA—ENDING UP IN PRISON FOR LIFE WITHOUT PAROLE

RICHARD L. ROSENBAUM*

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I. INTRODUCTION

A Child of any age may be tried as an adult under Florida law.¹ When charged as an adult, a child is required to be treated “in all respects as an

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1. Section 985.225 of the *Florida Statutes* states:

(1) A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in s. 985.219(8) unless and until an indictment on the charge is returned by the grand jury. When such indictment is

adult.”² What this means in reality is that children who are unable to drive, vote, consume alcohol, hold public office, or even fight for our country, face up to imprisonment for life without the possibility of parole. Immature “babies” can become embroiled in Florida’s adult criminal justice system; and as the law stands now, judges lack the necessary discretion in certain cases to impose a sentence other than life imprisonment without the possibility of parole, no matter how young the accused. This article addresses how unfairly Florida treats children prosecuted as adults; the prosecution and conviction of twelve-year-old Lionel Tate and the subsequent appellate reversal of the conviction; pending legislative bills regarding the prosecution of juveniles; and a suggestion as to how Florida can rehabilitate children accused or convicted of committing “adult crimes” through treatment and counseling, instead of incarcerating them.

Counsel for children charged or convicted as adults, and juvenile justice organizations throughout Florida and the world have argued that Florida’s “juvenile transfer statutes” are unconstitutional on their face and as applied on numerous levels.³ Unfortunately, thus far the courts have been less than receptive to these arguments. For example, in *Brazill v. State*, the court noted that child defendants have unsuccessfully argued that section 985.225 of the *Florida Statutes* is unconstitutional as a violation of due process, equal protection, and separation of powers.⁴

The jurisdiction of the court attaches to the child, and the case, upon service of a summons on the child *and* a parent, a legal or actual custodian, or guardian of the child.⁵ If a child is taken into custody, jurisdiction at-

returned, the petition for delinquency, if any, must be dismissed and the *child must be tried and handled in every respect as an adult*:

(a) On the offense punishable by death or by life imprisonment; and

(b) On all other felonies or misdemeanors charged in the indictment which are based on the same act or transaction as the offense punishable by death or by life imprisonment or on one or more acts or transactions connected with the offense punishable by death or by life imprisonment.

....

(3) If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. If the juvenile is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he or she was indicted as a part of the criminal episode, the court may sentence pursuant to s. 985.233.

FLA. STAT. § 985.225 (2003) (emphasis added).

2. *See id.*

3. *See Tate v. State*, 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003); *Brazill v. State*, 845 So. 2d 282 (Fla. 4th Dist. Ct. App. 2003); *Phillips v. State*, 861 So. 2d 1157 (Fla. 1st Dist. Ct. App. 2003).

4. *Brazill*, 845 So. 2d at 286.

5. § 985.219(7).

taches before or after the filing of a petition, whichever occurs first, regardless of whether a summons was served.⁶ Thereafter the court controls the prosecution of the child.⁷ Appellate tribunals have sloughed off claims that section 985.225 violates the law citing "easy affirmance" language:

[t]he constitutionality of a statute is reviewed *de novo*.⁸ There is a strong presumption that a statute is constitutionally valid.⁹ It is well established that where reasonably possible and consistent with constitutional rights, a statute will be interpreted by the courts in a manner that resolves all doubt in favor of its validity.¹⁰

It is based upon Chapter 985 that unintended results occur. Even prosecutors may deem a life sentence without parole unjust when imposed on a child Defendant who has never before been charged with any criminal offense. In Tate's case, not only the prosecutor but the victim's family, and a warden from the Department of Juvenile Justice Level X facility joined in his quest for a non-mandatory sentence. Luckily, in Tate's case, he was spared from serving a mandatory life imprisonment sentence without the possibility of parole.¹¹ However, until legislative changes are enacted, children will continue facing the possibility of life in prison without parole upon conviction.

II. FLORIDA'S TRANSFER STATUTES ARE UNCONSTITUTIONAL: YOUNG CHILDREN PROSECUTED UNDER FLORIDA LAW ARE TREATED MORE HARSHLY THAN OTHERS PROSECUTED IN VIOLATION OF THEIR RIGHTS TO EQUAL PROTECTION AND DUE PROCESS OF LAW

Child advocates assert that children's rights to equal protection and due process of law, under both the *United States* and *Florida Constitution*, are violated when they are transferred to adult court pursuant to section 985.225 of the *Florida Statutes*, and are sentenced to life imprisonment without parole for a first degree felony offense.¹² This is the "younger generation,"

6. *Id.*

7. *Id.*

8. See *Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002); *Dickerson v. State*, 783 So. 2d 1144, 1146 (Fla. 5th Dist. Ct. App. 2001); *Lowe v. Broward County*, 766 So. 2d 1199, 1203 (Fla. 4th Dist. Ct. App. 2000).

9. See *McGrath*, 824 So. 2d at 146; *In re Estate of Caldwell v. Caldwell*, 247 So. 2d 1, 3 (Fla. 1971); *Dickerson*, 783 So. 2d at 1146.

10. *Brazill*, 845 So. 2d at 287 (citing *DuFresne v. State*, 826 So. 2d 272, 274 (Fla. 2002)); see also *State v. Mitro*, 700 So. 2d 643, 645 (Fla. 1997); *McKibben v. Mallory*, 293 So. 2d 48, 51 (Fla. 1974).

11. *Tate v. State*, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003).

12. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 4.

many of whom are not yet competent to be treated as adults and not yet mature enough to understand that when adults say “life”—they mean LIFE. Furthermore, in Florida, a juvenile’s competency to stand trial or be sentenced is assessed by adult standards.¹³ Slightly older juveniles, who are convicted as adults for crimes punishable by life imprisonment, crimes committed with actual premeditation or malice, are entitled to a presentencing hearing to determine whether they will be sentenced as juveniles or as adults. A child’s transfer to adult court from juvenile court constitutes a fundamental error, which “reaches down to the validity of the trial itself,” and it is this type of error where the interests of justice present a compelling demand for its application.¹⁴

Section 985.225 fails to comport with minimal due process requirements for children under fourteen years of age, and is unconstitutional as applied to children.¹⁵ The Florida and United States Constitutions each provide that “[n]o person shall be deprived of life, liberty, or property without due process of law.”¹⁶ Substantive due process protects the full panoply of individual rights from unwarranted encroachment by the government; and procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.¹⁷ When basic rights are at stake, the means by which the State can protect its interest must be narrowly tailored to achieve its objectives through the least restrictive means.¹⁸

Under the Florida Constitution, the Legislature may restrict or qualify the right to juvenile treatment, and may conclude that certain juveniles are not entitled to juvenile procedure and sanctions.¹⁹ This is not, however, a license to deny the basic requirements of due process of law once in adult court.²⁰

Florida’s transfer statutes offer three charging options to a prosecutor when a juvenile is fourteen or fifteen years of age, has no prior violent of-

13. FLA. R. CRIM. P. 3.210.

14. FLA. STAT. § 985.225 (2003); *Maddox v. State*, 760 So. 2d 89, 96 (Fla. 2000).

15. See *Dep’t of Law Enforcement v. Real Prop.*, 588 So. 2d 957 (Fla. 1991) (providing a framework for determining whether due process has been violated when substantive rights are at issue, and restating the proper balancing tests under the Florida Constitution).

16. FLA. CONST. art. 1 § 9; U.S. CONST. amends. V, XIV.

17. *Dep’t of Law Enforcement*, 588 So. 2d at 959.

18. *Id.* at 964 (citing FLA. CONST. art. 1, § 9).

19. See FLA. CONST. art. 1, § 15(b); *Woodward v. Wainwright*, 556 F.2d 781 (5th Cir. 1977).

20. See *State v. Harris*, 356 So. 2d 315, 317 (Fla. 1978) (holding the Legislature may have the right to create offenses, but the court has the right to dictate procedures that comply with due process).

fenses, and is alleged to have committed an offense punishable by life imprisonment.²¹ 1) the juvenile court retains jurisdiction; 2) the prosecutors may seek an indictment;²² or 3) the State can prosecute the juvenile as an adult by the direct filing of an information.²³ If, however, the juvenile is *under* fourteen years of age, only options one and two are available.²⁴ Section 985.225 is the only statute, which allows for the transfer of children under fourteen years of age to adult court.

From that moment on, the child faces a mandatory life sentence, and the child's circumstances—the child's capacity to form criminal intent, the child's age, the lack of specific intent to harm, and the likelihood of rehabilitation—are all deemed irrelevant.

Compounding the problem is the more lenient treatment afforded older juveniles. Those juveniles are entitled to a hearing to determine the propriety of juvenile versus adult sanctions. The only way to charge a thirteen-year-old child or younger as an adult is by indictment; and therefore, the youngest offenders receive the harshest treatment.²⁵

The inequity is that juveniles who are indicted pursuant to section 985.225 *must* be sentenced as adults; while older juveniles, which the court obtains jurisdiction via the filing of an information,²⁶ may be sentenced as an adult *or* as a juvenile.²⁷ When determining whether juvenile sanctions should be imposed, the court is required to consider eight factors, including the sophistication and maturity of the offender, prior adjudications, and prospects for rehabilitation.²⁸

Adults must account for their criminal actions even when their life circumstances and childhoods were exceptionally difficult. Section 985.225 holds children of *any* age to this same ideal, without inquiring into any predispositions or environmental challenges, without any standards for mental capacity or ability to form criminal intent, and without a finding of intentional wrongdoing. In addition, section 985.225 is too broad as it does not

21. Section 985.225 states that children who are charged with a violation of state law punishable by death or by life imprisonment may be transferred to adult court once an indictment is returned. *See* Brennan v. State, 754 So. 2d 1, 6 (Fla. 1999) (stating death sentences for children under seventeen years of age constitute cruel or unusual punishment).

22. FLA. STAT. § 985.225 (2003).

23. § 985.227(1)(a). The state may prosecute a child of fourteen or fifteen by the discretionary direct filing of an information for murder, robbery, kidnapping, and sexual battery. *Id.*

24. *See* § 985.225.

25. *Id.*

26. § 985.227(1).

27. § 985.233(4)(2).

28. § 985.233(1)(b).

distinguish between those who commit premeditated murder with a capacity to form criminal intent, and those who commit less culpable life felonies.

While the State may have a compelling interest in promoting public safety, treating children of any age as adults in every way, and punishing the children for punishment sake is inconsistent with public policy.²⁹ Section 985.225 does not reflect the State's *parens patriae* interest—promoting the welfare of children involved in criminal activity.³⁰ “Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control.”³¹

Equal protection provides that all persons similarly situated be treated alike.³² Applying the equal protection clause to state action, the question is whether some rational explanation justifies the disparate treatment of similarly situated children.³³ When an age restriction is attacked on due process or equal protection grounds, it must be shown that: 1) the restriction is reasonable, and 2) the restriction is not discriminatory, arbitrary, or oppressive.³⁴

Prosecutors have broad discretion in deciding whether to charge or file a decision. The concern is the arbitrary and oppressive treatment of children convicted of crimes punishable by life imprisonment, who committed a crime that did not require the showing of intentional wrongdoing. Compare this to the treatment of older juveniles who were convicted of life felonies, but were initially charged by the direct filing of an information.

A statutory scheme that mandates *adult* sanctions for our youngest juvenile offenders simply because they were indicted; and permits *juvenile* sanctions for older offenders who committed crimes with malice or premeditation because the law does not require an indictment, cannot be rationally justified. “[T]he requirement of a grand jury indictment only ensures that

29. It is also at odds with a parents' right to the care and custody of their children, and the children's concomitant rights. Certainly at some point, a child is very young the inquiry into culpability, capacity, and competency so minimal, and the period of incarceration so long, that the parent's rights must also be weighed. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see also *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 570 (Fla. 1991).

30. See *Schall v. Martin*, 467 U.S. 253, 265 (1984); *P.W.G. v. State*, 702 So. 2d 488, 491 (Fla. 1977).

31. *McKeiver v. Penn.*, 403 U.S. 528, 551–52 (1971).

32. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); U.S. CONST. amend. XIV; FLA. CONST. art. 1, § 9.

33. *Eisenstadt*, 405 U.S. at 446; *State v. Walborn*, 729 So. 2d 504, 505 (Fla. 2d Dist. Ct. App. 1999).

34. *Walborn*, 729 So. 2d at 505.

there is probable cause for the charge it does not determine the propriety of prosecuting a juvenile as an adult.”³⁵

In *State v. Cain*, the Supreme Court of Florida rejected the argument that the transfer statutes violated due process and equal protection rights by giving prosecutors unbridled discretion to prosecute juveniles as adults without a hearing.³⁶ However, the statutory scheme has changed since *Cain*. In 1980, the transfer statutes gave equal treatment to all juveniles, regardless of age or indictment, by requiring a disposition hearing to determine whether juvenile or adult sanctions were appropriate, and to determine whether to offer the juvenile the benefits of the Youthful Offender Act.³⁷ The court reasoned that because juveniles, who are amenable to rehabilitation, will be considered for juvenile sanctions, the transfer statutes did not violate the juvenile's due process rights.³⁸ In *Goodson*, the court reasoned that the Florida Legislature did not intend to treat younger juvenile offenders more harshly than older juvenile offenders; and therefore, juveniles who were indicted and those who waived into adult court were also entitled to the benefits of the Youthful Offender Act.³⁹ Such sentencing disparity, based on the discretionary charging authority of a prosecutor, causes disparate results when based solely upon age, because the younger, presumably less culpable offenders, are subject to receive the harshest penalties.

III. FLORIDA TRANSFER STATUTES VIOLATE THE CONSTITUTIONAL PRINCIPLES OF THE SEPARATION OF POWERS AND FLORIDA'S NON-DELEGATION DOCTRINE

Defense counsel for children similarly advocate that Florida's transfer statutes, offend due process and State and Federal law by violating the Separation of Powers and Non-Delegation Doctrines of the United States and Florida Constitution.⁴⁰ The Legislature has unlawfully delegated its authority to define crimes and structure penalties by allowing a state attorney to

35. *State v. Cain*, 381 So. 2d 1361, 1365 (Fla. 1980).

36. *Id.*

37. See chapter 958 of the *Florida Statutes*; see also *Cain*, 381 So. 2d at 1366; *Goodson v. State*, 392 So. 2d 1335, 1337 (Fla. 1st Dist. Ct. App. 1980), *decision Approved by State v. Goodson*, 403 So. 2d 1337 (Fla. 1981) (establishing that all juveniles tried as adults are considered for juvenile sanctions, whether jurisdiction was pursuant to an indictment or the filing of an information).

38. *Cain*, 381 So. 2d at 1366.

39. *Goodson*, 392 So. 2d at 1337.

40. FLA. CONST. art. II, § 3. Florida's Constitution "requires a strict separation of powers" analysis on the issue of non-delegation, and therefore this argument will focus Florida law. See *B.H. v. State*, 645 So. 2d 987, 991 (Fla. 1985).

seek an indictment for children under fourteen, thereby delegating the decision to charge children “of any age” of a crime punishable by death or life imprisonment.⁴¹ The Florida Legislature has delegated this authority without implementing any guidelines to ensure the executive branch is carrying out the legislature’s intent.

The prosecuting attorney has the discretion to bring charges in juvenile court, or seek an indictment pursuant to section 985.225. If a prosecutor chooses to present a case to a Grand Jury, the Grand Jury will most likely indict the accused because a Grand Jury “would indict a ham sandwich.”⁴² In Tate’s case, at the age of twelve, he was indicted for premeditated murder in the first degree.⁴³ Because he was indicted by a Grand Jury, the only available penalties for Tate were either 1) life imprisonment without the possibility of parole, or 2) death. The age of twelve was too young for our society to accept that he should be executed by the State. However, he was also too young to be sentenced to life imprisonment without parole, but he was sentenced to life without parole nonetheless. The court rejected the sentencing argument, instead overturning Tate’s conviction on the competency issue.⁴⁴

Section 985.227 allows a state attorney to charge fourteen or fifteen-year-old children accused of a life felony by the direct filing of an information.⁴⁵ The state attorney is only authorized to do this “when in the state attorney’s judgment and discretion the public interest requires that adult sanctions be considered or imposed.”⁴⁶ The statute also requires the state attorney to develop written policies and guidelines that will govern the determinations for filing an information against a juvenile, and to submit those guidelines to the Governor and State Legislature.⁴⁷ Finally, upon conviction, the court has the discretion to impose either juvenile or adult sanctions based on the consideration of eight statutory criteria.⁴⁸ However, unlike section 985.227, section 985.225 provides no similar guidelines or requirements on the state attorney’s office, and fails to provide the Grand Jury with procedures for determining the propriety of adult sanctions for an accused child under the age of fourteen. Once charged by the Grand Jury for a life felony, adult sanctions are mandatory.⁴⁹ Open-ended authority is thereby granted to

41. See FLA. STAT. § 985.225 (2003).

42. *Kearns v. Wolverton*, 381 S.E.2d 258, 262 (W. Va 1989).

43. § 784.02.

44. *Tate v. State*, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003).

45. § 985.227(1)(a).

46. § 985.227(1)(a).

47. § 985.227(4).

48. § 985.233(4)(b).

49. § 985.233(4)(a).

the executive branch to seek an indictment of a child of any age, and treat the child "in every respect as an adult."⁵⁰ The requirement that a Grand Jury must indict "only ensures that there is probable cause for the charge; it does not determine the propriety of prosecuting a juvenile as an adult."⁵¹

When the juvenile court is vested with original jurisdiction of a child, that jurisdiction confers special rights and immunities by the juvenile code and a transfer or waiver of that jurisdiction must satisfy the basic requirements of due process and fairness.⁵² The Supreme Court described the critical importance of the transfer decision: "[t]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . ."⁵³ Prior to *Kent*, challenges to Florida's juvenile transfer statutes have not been successful; however, critical changes in the statutes illuminate the need to revisit the constitutionality of section 985.225.

It is well established that the Legislature may not delegate the power to exercise unbridled discretion in applying the law.⁵⁴ While the Supreme Court of Florida rejected the assertion that Florida law amounted to an unlawful delegation of authority,⁵⁵ the statutory scheme has changed drastically since 1980. Most significantly, children of any age, who are indicted for life felonies, are no longer entitled to a hearing to determine whether juvenile or adult sanctions will be imposed. Further, *Cain* addressed the prosecutor's discretion to charge a sixteen or seventeen-year-old repeat offender as an adult, where that teenager would receive a hearing to determine the propriety of juvenile or adult sanctions upon conviction.⁵⁶

A child's rights to due process of law is violated under both the Florida and United States Constitutions when the child is transferred to adult court for criminal prosecution at age twelve, and treated "in every respect like an adult."⁵⁷ A statute that treats a child of any age as an adult in every way,

50. See § 985.225.

51. *State v. Cain*, 381 So. 2d 1361, 1365 (Fla. 1980).

52. *Kent v. U.S.*, 383 U.S. 541, 552 (1966) (stating due process required a hearing and representation of competent counsel before transfer where statute required a "full investigation" prior to transfer).

53. *Id.*

54. *Cain*, 381 So. 2d at 1367.

55. *Id.* at 1368.

56. *Id.*

57. § 985.225. Section 985.225, provides:

A child of any age who is charged with a violation of state law punishable by death or life imprisonment is subject to the jurisdiction of the court as set fourth in Section 985.219(7) unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled *in every respect as an adult*.

Id. (emphasis added).

without procedural protections, triggers numerous process concerns, including the intrusion into a child's right to privacy, where principles of fundamental fairness and Constitutional scrutiny must be reapplied to the facts of each case and the law.

Due process "is not a technical conception with a fixed content unrelated to time, place, and circumstance. Rather the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance lofty."⁵⁸ Courts have determined that a child's due process rights are not violated when the child is denied the "rehabilitative aspect of juvenile court solely because the state decided to procure an indictment."⁵⁹ Unfortunately, there is no absolute right conferred by common law, constitution, or otherwise, requiring children to be treated in a special system for juvenile offenders.⁶⁰ The Florida Constitution a "child" as defined by law may be charged "with a violation of law as an act of delinquency instead of [a] crime."⁶¹ The Supreme Court of Florida has interpreted this provision to mean that "a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature."⁶² Only the legislature has the power to determine who, if anyone, is entitled to treatment as a juvenile.⁶³

Subjecting children under fourteen years of age to the doctrine of transferred intent defies the common law doctrine of incapacity, contemporary scientific research on child and adolescent organic brain structure, and public policy concerning juvenile delinquency. Due process should require that a child have the capacity to form criminal intent for murder before he can be sentenced to life without parole for murder. For example, the State failed to establish Tate's capacity to form criminal intent. The State did not need to

58. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981).

59. *Tate v. State*, 864 So. 2d 44, 53 (Fla. 4th Dist. Ct. App. 2003) (quoting *Brazill v. State*, 845 So. 2d 282, 287 (Fla. 4th Dist. Ct. App. 2003)).

60. *See In Re Gault*, 387 U.S. 1, 16 (1967); *Johnson v. State*, 314 So. 2d 573, 576 (Fla. 1975) (noting that it was within legislative authority pursuant to Article I, Section 15(b) of the Florida Constitution, to create an exception where children would be treated as adults); *State v. Cain*, 381 So. 2d 1361, 1363 (Fla. 1980).

61. FLA. CONST. art. I, § 15(b).

62. *Cain*, 381 So. 2d at 1363.

63. *Id.*; *see also Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977) (finding that "treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved").

prove premeditation or malice to kill, and therefore it was never clear whether Tate had the capacity to form criminal intent.⁶⁴

Secondly, the court lacked jurisdiction prohibiting the State from prosecuting Tate for felony murder when he could not be held criminally responsible for the underlying felony. In Florida, the law and legislative intent is that children under fourteen are not criminally responsible in adult court for aggravated child abuse, because it is not a "life felony," and thus section 985.225 is not implicated. The clear inference is that the Legislature did not intend to prosecute children under fourteen for felony murder when the underlying felony is not also a "life felony" in adult court. While section 985.225, unconstitutionally permits a child of any age to be indicted for a "life felony," and treated like an adult in every way, it is inconsistent with public policy and legislative intent to include felony murder among the qualifying life felonies.⁶⁵

Lastly, a child's right to due process is violated when a child is sentenced as an adult to life without parole for felony murder where the underlying felony did not contain an element of intentional wrongdoing. Tate was never shown to have had any intent to harm. Sentencing a twelve-year-old, whose moral guilt was not established, is at odds with traditional concepts of ordered liberty: "American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to the 'degree of [his] criminal culpability.'"⁶⁶ Tate was entitled to a reversal of his life sentence on this ground alone.

IV. SO MUCH FOR A CHILD'S RIGHTS TO PRIVACY WHEN THE CHILD IS TREATED AS AN ADULT

The Florida Constitution expressly provides for a strong right to privacy not found in the United States Constitution.⁶⁷ Florida's strong right to privacy is set forth in Article I, Section 23 of the *Florida Constitution*. When a child is charged as an adult and the child is treated "in every aspect" as an adult, the child's right to privacy is violated. Children, even juvenile offenders, have unique privacy rights and the adult court does not provide for the

64. Older juveniles may be presumed to have capacity to form criminal intent, and therefore a felony murder conviction may stand with a mere showing of an intent to commit the underlying felony.

65. See *People v. Cruz*, 225 A.D.2d 790 (1996) (holding a fifteen-year-old could not be held criminally responsible for felony murder when the underlying felony was one for which there was no adult criminal responsibility and therefore no "felonious intent" to transfer).

66. *Emmund v. Florida*, 458 U.S. 782, 800 (1982) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

67. *Winfield v. Dep't. of Bus. Reg.*, 477 So. 2d 544, 547 (Fla. 1985).

protection of these rights; however, the juvenile system does. When a child has a legitimate expectation of privacy, the compelling state interest standard of review must be met when assessing a claim of governmental intrusion.⁶⁸ Whether an individual has a legitimate expectation of privacy is determined by considering all the circumstances, including subjective and objective manifestations of that expectation and the values society seeks to foster.⁶⁹ The juvenile code is evidence that society seeks to foster the privacy rights of children by keeping their school records and court records confidential.⁷⁰

Children have a legitimate expectation of privacy in the confidentiality of their elementary education records.⁷¹ The Legislature has passed laws that make school records inadmissible in juvenile proceedings prior to a disposition hearing.⁷² However, once transferred to adult court, there are no evidentiary rules in place to protect these rights.

Unless and until the Florida Legislature passes laws that protect a child's right to privacy in adult court, or makes a compelling showing to treat children as adults in every way, treating our youngest offenders as adults violates this constitutionally protected right. While older juveniles may not have a reasonable expectation of privacy because their status as adults is uncontested, the privacy rights of children under fourteen should be protected at least until a final judgment is rendered. Treating children as adults in this respect is unnecessary because keeping the record confidential would not impair the state's interest in public safety.

V. REVERSAL OF TATE'S CONVICTION AND MANDATORY LIFE SENTENCE BECAUSE OF A FAILURE TO ESTABLISH COMPETENCY

The appellate decision reversing Tate's conviction and sentence was based upon the trial court's failure to establish that Tate was competent to proceed to trial as an adult.⁷³ Tate contended on appeal that his conviction

68. *Id.*

69. *Bd. of County Cmm'rs of Palm Beach County v. D.B.*, 784 So. 2d 585, 588–89 (Fla. 4th Dist. Ct. App. 2001).

70. FLA. STAT. § 228.093(1)(d) (2003).

71. *See id.* (“[e]very pupil or student shall have a right of privacy with respect to the education records kept on him or her”); *see also* 20 U.S.C. § 1232g(b)(1) (2000); *Owasso Ind. School Dist. No. 1-011 v. Falvo*, 534 U.S. 426, 428 (2002) (“sensitive information about students may not be released without parental consent” and schools that violate this law may lose federal funding).

72. *See* FLA. STAT. § 228.093(12) (2003); *F.A.T. v. State*, 690 So. 2d 1347 (Fla. 1st Dist. Ct. App. 1997) (vacating judgment because school attendance records were inadmissible).

73. *Tate v. State*, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003). In analyzing the facts, the appellate court determined that this could not have been accidental. *Id.* Under-

and resultant life sentence without parole violated due process because: 1) it was unfair to apply the felony murder rule to Tate and all children under fourteen without proving capacity to form criminal intent;⁷⁴ 2) felony murder should not apply to children under fourteen in adult court when the court lacks jurisdiction over the predicate felony;⁷⁵ and 3) even if the felony murder rule applied, the jury failed to find that Tate intended to harm anyone.⁷⁶

Shortly after Tate's conviction, yet prior to sentencing, appellate counsel was brought in to "clean up the mess." When undersigned first met with Tate, it was evident that the child was unable to appropriately assist in his defense, and was not capable of understanding important principles of law relevant to the post-trial proceedings. Counsel immediately requested competency evaluations, and questioned Tate's pre-trial decisions based upon his lack of competency at the time.⁷⁷ This was done, knowing all along that should the court find Tate incompetent only for sentencing, re-sentencing would result in the same sentence—life imprisonment without parole, despite the fact that Lionel Tate was twelve at the time of the incident. Therefore, counsel continually argued that Lionel Tate was incompetent post-trial, pre-trial, and during trial, requiring a re-trial.

First, the court needed to grapple with the question of whether a retroactive competency evaluation was appropriate.⁷⁸ The court determined that because of the vast amount of time which had elapsed, a retroactive competency hearing would not be beneficial.⁷⁹ Accordingly, the court reversed and remanded for a new trial.⁸⁰

The question of whether an accused can proceed to trial while a minor is easily distinguishable from the question of whether anyone is competent to be tried. Based upon Tate's young age, twelve-years-old at the time of the offense, his low IQ of 90, his developmental immaturity, his lack of prior exposure to the criminal justice system, and the overall facts and circum-

signed respectfully points out the fact that all of the facts were not presented to the appellate tribunal. Based upon the facts presented, the appellate decision is accurate in determining that the cause of death appears to be intentional rather than accidental. However, based upon evidence established and ascertained after undersigned counsel was brought in to assist, strong evidence supports Tate's assertions of innocence based upon a lack of any criminal intent, and strong evidence, buttressed by expert medical testimony, supports Tate's claims that Tiffany Eunick's death was accidental.

74. *Id.* at 53.

75. *Id.* at 51.

76. *Id.* at 53.

77. *Tate*, 864 So. 2d at 47.

78. *Id.* at 51.

79. *Id.*

80. *Id.*

stances, the appellate tribunal correctly determined that Tate was not proven to be competent to proceed to trial or to be sentenced.⁸¹ Accordingly, the result in his case was eminently fair.

VI. CHILDREN TRIED AS ADULTS: A PRESUMPTION OF INHERENT INCOMPETENCY

Tate asserted that his State and Federal constitutional rights to due process of law and his rights to a fair trial were violated by the trial court's failure to order competency evaluations, to conduct a competency hearing on its own initiative or at the repeated requests by the defense.⁸² Tate maintained that *bona fide* evidence of his incompetence entitled him to be evaluated for competency and for the court to conduct a competency hearing prior to trial and sentencing, because he was facing a mandatory life sentence if convicted. Tate maintained on appeal that the court's failure to make any inquiry into his competence deprived him of his right to a fair trial and to due process of law.⁸³

In light of Lionel Tate's extremely young age and his lack of previous exposure to the judicial system, competency evaluations were warranted. Exacerbating the situation was the complexity of the legal proceedings. In light of the testimony elicited by both parties regarding Tate's developmental immaturity, and the submission of affidavits from lawyers and a neuropsychologist that Tate lacked the necessary competency to proceed, ample evidence existed to appoint psychologists to evaluate Tate and to require a competency hearing.⁸⁴

A defendant is considered competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."⁸⁵ The trial court was well aware of the fact that Tate was only thirteen at the time of the trial, and twelve at the time of arrest—when crucial defense decisions were made. The Supreme Court has, in many contexts, commented on the reduced capacities of juveniles,

81. *Id.* at 50.

82. *Tate*, 864 So. 2d at 50.

83. *Id.* at 46–47; *see Pate v. Robinson*, 383 U.S. 375 (1966); *Hill v. State*, 473 So. 2d 1253, 1257 (Fla. 1985).

84. *Tate v. State*, 864 So. 2d 44, 48–49 (Fla. 4th Dist. Ct. App. 2003). Prior to trial, the court conducted a brief plea colloquy with then thirteen-year-old Tate, which was profoundly inadequate to determine his competence for a decision of such tremendous consequence, given his age, immaturity, and nine or ten-year-old mental age. *Id.* at 50.

85. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

including their inability “to think in long-range terms” and inability to understand the costs and benefits of certain decisions.⁸⁶

The Appellant’s age is even more significant when analyzing the complexity of the proceedings against him. The “level of capacity sufficient to understand simple charges, such as driving without a license, may be grossly insufficient when a more complicated offense is involved.”⁸⁷ Here, the offense was among the most serious of chargeable offenses. Nevertheless, without any court ordered competency evaluations, Tate was asked to make profound decisions throughout the trial process regarding defense strategy, make relevant factual disclosures, intelligently analyze plea offers, and consider waiving important State and Federal constitutional rights.

Tate’s immaturity and developmental delays were very much at the heart of the permitted defense at trial.⁸⁸ Testimony revealed that this particular child was at an even greater intellectual and emotional disadvantage than the average thirteen-year-old. His I.Q. was 90 or 91, meaning that seventy-five percent of children his age scored higher.⁸⁹ Further, the doctors opined Tate had significant mental delays.⁹⁰ Even the State forensic psychologists agreed that Tate was immature, although one state witness did not agree with the concept of using a mental age.⁹¹

Appellate counsel requested competency evaluations post-trial, prior to sentencing, both orally and in writing. The evidence presented to the trial court clearly suggested that a competency evaluation was needed due to Tate’s youth and immaturity.⁹² The trial court abused its discretion in denying defense requests for a competency evaluation.⁹³

Appellate counsel requested a competency evaluation during a hearing on Defendant’s Motion for New Trial, stating that Tate “has no clue what we

86. *Thompson v. Oklahoma*, 487 U.S. 815, 825, 834 (1988); *see Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (CFC 15-18).

87. Melton et. al., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS*, (1997). For example, the Appellant maintains that the felony-murder rule was never intended as a vehicle to prosecute children under fourteen years of age for first degree murder (CFC 4).

88. *Tate*, 864 So. 2d at 50. While the defense attempted a “wrestling intoxication defense,” because of the trial court’s pretrial rulings on state motions in limine, Tate’s defense at trial centered around his lack of knowledge and lack of intent to harm.

89. *Id.* at 50.

90. *Id.* at 48.

91. *Id.* at 49 n.2.

92. *Id.* at 46–47.

93. *See Kelly v. State*, 797 So. 2d 1278 (Fla. 4th Dist. Ct. App. 2001) (reversing the conviction applying abuse of discretion as the proper standard of review in denying request for competency hearing).

are talking about.”⁹⁴ The judge asked Tate if he understood, and Tate shook his head “no.”⁹⁵ At that time, the court correctly determined that “at a minimum Tate should be evaluated by mental health experts.”⁹⁶ The court based its ruling on Rule 3.210 of the *Florida Rules of Criminal Procedure*, stating:

I’m also convinced that if *I denied your hearing at this particular point, that I would get ordered by the Fourth District Court of Appeals [sic] to have such a hearing.* And I’d rather do that while testimony is fresh, rather than trying to recall what happened three or four or five or six months down the road.⁹⁷

Minutes later, the judge “changed his mind” and denied Tate’s oral motion for a competency hearing, improperly denying leave for the defense to file a written motion.⁹⁸ The judge inappropriately based his decision solely on Tate’s demeanor in court.⁹⁹ A written motion and affidavits were filed nonetheless, maintaining that the Defendant was not competent to proceed.¹⁰⁰ The trial court denied Tate’s written Motion to Determine Competency, in large part, because it was incomprehensible to the judge that none of the numerous professionals, who had been in contact with Tate, had previously requested a competency hearing.¹⁰¹

Although the court’s frustration that competency was not raised pretrial or during trial might be justified,¹⁰² the cited reasons for denial of the motion are irrelevant.¹⁰³ Defense counsel’s affidavit specifically stated that “he

94. Tate v. State, 864 So. 2d 44, 47 (Fla. 4th Dist. Ct. App. 2003).

95. *Id.*

96. *Id.*

97. *Id.* (emphasis added).

98. *Id.* at 48.

99. Tate, 864 So. 2d at 48. Dr. Borg-Cater later testified for the state that she administered a twenty minute “competency interview” during her risk assessment evaluation and believed Tate to be competent. *Id.* at 47 n.2. The psychologist’s testimony was over a defense objection and an uncontroverted Record that the competency interview was not authorized by a court order. *Id.* The defense maintained any competency evaluation was not permissible under the Florida Rules of Criminal Procedure, and violated the Specialty Guidelines for Forensic Psychology. *Id.* Even state forensic expert Dr. Brannon admitted that with children you must “go deeper” to test their insights to see if they really understand. *Id.*

100. Tate, 864 So. 2d at 47.

101. *Id.* at 48.

102. *Id.* at 49. Tate’s trial counsel did not question Tate’s competency and learned during discovery that one of the state’s experts, Dr. Bourg-Carter claimed to have had the verbal consent of Tate, his mother, and a defense expert to perform a competency evaluation. *Id.* at 49 n.2.

103. FLA. R. CRIM. P. 3.210; Pate v. Robinson, 383 U.S. 375, 384 (1965); (stating failure of defense to raise competency, mental alertness displayed during “colloquies” with judge and demeanor at trial cannot be relied upon to dispense with a hearing on competency).

[Tate] is unable to communicate with me . . . and he did not and still does not possess an ability to appreciate the gravity of the charges . . .”¹⁰⁴ Neuropsychologist Dr. Mittenberg’s affidavit stated: “Tate has not been able to follow along with the legal proceedings I have been involved with.”¹⁰⁵ In addition, the court’s order (“R 764”) did not apply the proper standard for determining the motions: “the proper inquiry is whether the defendant *may* be incompetent, not whether he *is* incompetent.”¹⁰⁶ Therefore, the trial court not only failed to initiate a competency hearing under *Pate* and *Hill*, it abused its discretion by denying oral and written motions to determine Tate’s competency.¹⁰⁷

The written motion requested, *inter alia*, appointment of experts and a hearing to determine whether Tate was competent to reject the plea offer, and whether he had the ability to appreciate the range and nature of the possible penalties that could be imposed.¹⁰⁸ This motion was denied as untimely, and the court refused to consider the merits of the motion.¹⁰⁹ The trial court erred because a competency hearing is required at any material stage of a criminal proceeding or “*when necessary for a just resolution of the issues being considered.*”¹¹⁰ Further, Tate’s motion served as yet another reminder to the court of its obligation pursuant to *Pate* and Rules 3.210 and 3.211 of the *Florida Rules of Criminal Procedure* to determine Tate’s competence when reasonable grounds exist to believe an accused may be incompetent.¹¹¹

Despite the well-founded professional doubts concerning Tate’s competency, the judge denied all defense requests for Tate to be evaluated by appropriate mental health practitioners.¹¹² The court refused to conduct a hearing, which would have allowed the balancing of factors, an evaluation of the situation, and for the court to make a competency determination based upon the opinions of experts. The court stated that the Defendant’s demeanor and disinterest did not mean that he did not understand the proceedings.¹¹³ More

104. Defense Counsel’s Affidavit in Support of Motion to Determine Competency, *Tate v. State*, 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003) (No. 4D01-1306).

105. Dr. Mittenberg’s Affidavit in Support of Motion to Determine Competency, *Tate* (No. 4D01-1306).

106. *Tate v. State*, 864 So. 2d 44, 51 (Fla. 4th Dist. Ct. App. 2003); *see Tingle v. State*, 536 So. 2d 202, 203 (Fla. 1988).

107. *Tate*, 864 So. 2d at 48.

108. *Id.* at 51; *see* FLA. R. CRIM. P. 3.211.

109. *Tate*, 864 So. 2d at 47.

110. FLA. R. CRIM. P. 3.210(a)(1) (emphasis added).

111. *Tate*, 864 So. 2d at 47, n.2.

112. *Id.* at 48.

113. *Id.* at 50.

importantly, the judge relied heavily upon the fact that incompetency was never previously raised by the defense or forensic psychologists.¹¹⁴

The facts focused on by the trial judge are irrelevant.¹¹⁵ As in *Pate*, there is no justification for ignoring the uncontradicted testimony of Dr. Mittenberg regarding the defendant's reduced mental functioning and his opinion that a competency hearing was necessary.¹¹⁶ There was no reason not to give some weight to the sworn affidavits of experienced counsel and a neuropsychologist who each opined that Tate "did not and still does not possess an ability to appreciate the gravity of the charges" and the possible penalties.¹¹⁷

In *Hill v. State*,¹¹⁸ applying the United States Supreme Court precedents,¹¹⁹ the Supreme Court of Florida rejected the state's contention that "there was no evidence before the court that was sufficient to raise a *bona fide* doubt as to Hill's competency to stand trial."¹²⁰ Indeed, the situation at bar is easily distinguishable from those where competency evaluations were authorized by the court and conducted by appropriate professionals, or where a full competency hearing was conducted.¹²¹

Further, Tate's trial counsel, an officer of the court, offered to directly reveal to the judge Tate's comments that led him to believe that Tate was not competent.¹²² However, the court refused to receive the information.¹²³ Without question, reasonable grounds existed to believe that Tate was not mentally competent to proceed, and that he required an evaluation, constituting reversible error.¹²⁴ The foregoing established a *bona fide* doubt as to Tate's competency, and no logical reason supports the trial court's failure to order evaluations or to initiate a competency hearing. The trial court's failure to order a competency hearing violated Tate's State and Federal constitu-

114. *Id.* at 48.

115. *Pate*, 383 U.S. at 384–85.

116. *Tate v. State*, 864 So. 2d 44, 48 (Fla. 4th Dist. Ct. App. 2003); see *Pate v. Robinson*, 383 U.S. 375, 385 (1965) (stating appropriate demeanor at trial cannot be relied upon to dispense with a hearing on competency).

117. *Tate*, 864 So. 2d at 46–47, 48.

118. 473 So. 2d 1253 (Fla. 1985).

119. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate*, 383 U.S. at 375; *Dusky v. United States*, 362 U.S. 402 (1960); *Bishop v. United States*, 350 U.S. 961 (1956).

120. *Hill*, 473 So. 2d at 1259.

121. See e.g. *Mora v. State*, 814 So.2d 322 (Fla. 2002).

122. *Tate*, 864 So. 2d at 48.

123. *Id.*

124. See *Johnson v. State*, 756 So. 2d 215 (Fla. 4th Dist. Ct. App. 2000); *Finkelstein v. State*, 574 So. 2d 1164 (Fla. 4th Dist. Ct. App. 1991).

tional rights to due process of law and right to a fair trial, requiring reversal of the conviction and a remand for a new trial.¹²⁵

In a courageous ruling, the Fourth District Court of Appeal reversed Tate's conviction and sentence imposed for first degree murder as an adult, and remanding the cause for re-trial following a determination of competency.¹²⁶

When judges, prosecutors, victims' families, and juvenile justice organizations throughout the world vocally pronounce the inequity of Florida's juvenile transfer statutes, the way we treat our kids must be addressed and the laws changed.

Presently, two bills are pending before the Florida Senate addressing sentencing of juveniles. Each Bill is sponsored by Democratic Florida Senators. Senator Walter "Skip" Campbell has introduced Senate Bill 1346 ("SB 1346"), which limits the age at which a minor convicted of an offense punishable by death or life imprisonment may be sentenced as an adult.¹²⁷ SB 1346 would amend sections 985.226 and 985.227 of the *Florida Statutes* and revise the requirements of the State Attorney with respect to prosecuting a minor as an adult for violent felonies and for offenses punishable by death or life imprisonment.¹²⁸ SB 1346 would require that the courts commit a child seventeen or younger at the time of the offense to the Department of Juvenile or to a maximum-risk facility following the child's conviction of an offense that, if committed by an adult, would be punishable by death or life imprisonment. The court would be required to conduct a hearing after the child reaches the age of twenty-one to determine whether the child was rehabilitated. If so, the child would be placed on conditional release, if not, the child would be moved to adult prison with the eligibility for parole as an adult offender.

125. Tate v. State, 864 So. 2d 44, 51 (Fla. 4th Dist. Ct. App. 2003).

126. *Id.* at 54. Tate, the State of Florida, and the decedent's family all agreed that a negotiated plea was in everyone's best interest. A guilty-best interest plea was negotiated wherein Tate entered a guilty-best interest plea to the reduced charged of murder in the second degree, as an adult, and as a result thereof was adjudicated guilty and sentenced to three (3) years Department of Juvenile Justice, followed by one (1) year of community control, followed by ten (10) years probation, with special conditions that he perform 1000 hours of community service and receive psychological counseling and follow-up treatment if deemed necessary. Susan Candiotti, *Teen's mom agrees to deal for son: Plea bargain would reduce Lionel Tate's sentence to three years*, CNN.com, Dec. 31, 2003, at <http://www.cnn.com/2003/LAW/12/31/wrestling.death/> (last visited Apr. 8, 2004).

127. S. 1346, 2004 Reg. Sess. (Fla. 2004), available at http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=1346.

128. *Id.*

The most “kid friendly” Bill pending is Senate Bill 2104 (“SB 2104”), lodged by Senator Frederica Wilson, Democrat from Miami.¹²⁹ SB 2104 would enable kids to receive scrutiny and potential early release when the child reaches “the ripe old age” of twenty-one.¹³⁰ All offenders under the age of eighteen would be committed to the Department of Juvenile Justice rather than be warehoused in the Florida State Prison system.¹³¹ SB 2104 calls for “blended” or “mixed” sentencing, wherein the court has discretion to impose juvenile sanctions, or a combination of juvenile and adult sanctions.¹³²

Finally, Senator Steve Geller recently proposed Senate Bill 530 (“SB 530”), which was not passed.¹³³ In essence, SB 530 would have provided that a child fifteen or younger, who was found to have committed an offense punishable by death or life imprisonment, would have been eligible for parole if he or she had not previously been adjudicated for certain offenses.¹³⁴ SB 530 would have required that the child be incarcerated in a youthful offender facility for a minimum period.¹³⁵ Lastly, SB 530 would have required the Parole Commission to consult with the child to consider release under section 947.16, by interviewing the child within eight months after confinement.¹³⁶ Thereafter, the child’s case would have been eligible for review every two years to consider possible release. If the child was not granted parole by the time the child reached twenty-five years of age, the child would then be transferred from a youthful offender facility to an adult state prison.

VII. CONCLUSION

The best changes in the law should encompass all three aforementioned Bills; kids should not be tried as adults until they are older and more mature; prosecutors should not enjoy such broad discretion in prosecuting minors;

129. S. 2104, 2004 Reg. Sess. (Fla. 2004), http://www.flsenate.gov/cgibin/view_page.pl?Tab=session&Submenu=1&FT=D&File=sb214.html&Directory=session/2004/Senate/bills/billtext/html/.

130. *Id.*

131. *Id.*

132. *Id.*

133. Beth Reinhard, *Parole denied for kids who get life*, MIAMI HERALD, Apr. 1, 2004, <http://www.miami.com/mld/miamiherald/news/state/8326125.htm%20on%20April%201,%202004> (last visited Apr. 8, 2004).

134. S. 530, 2004 Reg. Sess. (Fla. 2004), http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2004&billnum=530; see Associated Press, *Bill would give youthful killers chance at parole*, ST. PETERSBURG TIMES, JAN. 8, 2004, http://www.sptimes.com/2004/01/08/State/Bill_would_give_youth.shtml (last visited Apr. 8, 2004).

135. *Id.*

136. *Id.*

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and if children under eighteen years of age are convicted they should be sent to the Department of Juvenile Justice to be rehabilitated. As a society, we must not lock children up and throw away the key. Every child is redeemable.

ABOLISHING THE USE OF THE FELONY-MURDER RULE WHEN THE DEFENDANT IS A TEENAGER

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I. INTRODUCTION

In several recent, highly publicized murder cases involving pre-teens and teenagers, prosecutors have used the felony-murder rule to ensure conviction of these young defendants.¹ The felony-murder rule makes it easier

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1. Nathaniel Brazill, age thirteen; Lionel Tate, age twelve; Jonathan Miller, age fifteen; Jon R. Morgan, age fourteen. Jon Morgan was tried and convicted in adult court for the murder of his grandparents, Keith and Lila Cearlocks. *People v. Morgan*, 718 N.E.2d 206 (Ill. App. Ct. 1999). The jury was instructed that Jon could be convicted of both knowing/intentional murder and felony-murder. *Id.* at 210. The predicate felonies were aggravated battery and discharge of a firearm. *Id.* at 211. On appeal, the court found that it was an error to instruct the jury that Morgan could be convicted under felony-murder theory because the

for prosecutors to gain convictions because it relieves them of the often onerous burden of proving that the teenage defendant intended to kill the victim. Instead, prosecutors need only prove that the defendant intended to commit the underlying predicate felony, and need not offer any proof that death was an intended or even a foreseeable consequence.

An examination of the history of the felony-murder rule, the tension between the felony-murder rule and the common law infancy defense, and the policies underlying each rule demonstrates that the felony-murder rule was never intended to be applied to children under the age of fourteen. First, the common law doctrine of incapacity is more firmly rooted in history than the felony-murder rule and predates the felony-murder rule by centuries. Moreover, criminal capacity is a necessary prerequisite to criminal *mens rea*. Before one can apply the felony-murder rule, which dispenses with the *mens rea* requirement of murder, courts must first find that the child-defendant is capable of forming criminal intent. The infancy defense is based on the presumption that a child-defendant between the ages of seven and fourteen is incapable of forming criminal intent. When these two common law creations clash, as they have in several recent cases, the infancy defense should supersede the felony-murder rule.

Longstanding developmental psychological² research into the cognitive capacity of teenagers also buttresses the argument that the felony-murder rule should not be applied to children under fourteen, and perhaps not to older adolescents either.³ This research reveals that many pre-adolescents and adolescents⁴ are not competent to stand trial, i.e., incapable of understanding the legal proceedings against them, and unable to meaningfully assist in their own defense.⁵ More recent social science research suggests that juveniles, particularly those under age fifteen, as a class, make decisions differently than adults, and are more susceptible to influence, more impulsive, less risk-adverse, and less capable of seeing the long-term consequences of their actions.⁶ Finally, emerging research from the field of neuro-

predicate felonies did not involve conduct with a felonious purpose other than the killing itself. *Id.* at 212.

2. Developmental psychology is "the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle." Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 391 (1999).

3. *Id.* at 401-04.

4. Pre-adolescents are those children under the age of twelve; adolescents are those between the ages of twelve and seventeen; those ages eighteen to twenty-four are often called young adults. *See generally id.*

5. *Id.*

6. *See id.*

science, using MRIs and other technologies which scan the brain, suggests that differences in the organic structure and function of the teenage brain extend these disabilities in impulse control and decision-making into the late teens and early twenties.⁷

This article will begin with case studies of juveniles charged with first-degree murder under the felony-murder doctrine. Next, the article will review the historical underpinnings of the felony-murder rule and the common law defense of infancy, and argue that as an historical matter, the felony-murder rule was never intended to apply to juvenile offenders under the age of fourteen. In addition, we will argue that none of the philosophical justifications for the felony-murder rule make strong sense when applied to these juveniles and older adolescents. In Part IV, we will review the recent social science and brain development research which supports limiting the felony-murder rule to adult defendants. In the concluding section, we will suggest some policy changes that could reduce the impact the felony-murder rule has on teenage defendants.

II. CASE STUDIES

A. *Lionel Tate*

Six-year-old Tiffany Eunick died on July 28, 1999, after playing much of the day with twelve-year-old Lionel Tate, a 166-pound-boy who claimed that he had been practicing professional wrestling moves on the girl as they played in his Pembroke Park, Florida home.⁸ The medical examiner's findings did not support Lionel's claims that he and Tiffany were involved in innocuous roughhousing.⁹ Lionel's story that he had picked up Tiffany in a bear hug while they were playing tag and accidentally hit her head on a coffee table did not square with the evidence of her extensive injuries, including head trauma, lacerations to her liver, and several broken ribs.¹⁰ Broward County prosecutors brought Lionel's case before a grand jury on August 11, 1999, seeking charges of murder in adult court.¹¹ Since Lionel was originally charged with an open count of murder, the grand jury could have returned with an indictment for first or second-degree murder, or decided that

7. See Paul Thompson, Editorial, *Brain Research Shows a Child Is Not an Adult*, SUN-SENTINEL (Ft. Lauderdale), May 25, 2001, at 31A, available at 2001 WL 2680069.

8. Jodie Needle, *Boy Charged with Murder in Death of Playmate*, 6, SUN-SENTINEL (Ft. Lauderdale), Aug. 12, 1999, at 1B, available at 1999 WL 20275653.

9. *Id.*

10. *Id.*

11. *Id.*

there was not sufficient evidence to indict.¹² After listening to medical testimony and other witnesses, the grand jury indicted Lionel for first-degree murder, making him among the youngest children in the country to face such charges in adult court.¹³ Under Florida's statutory scheme, if Lionel were convicted of first-degree murder, the judge would have no choice but to sentence him to life in prison without the possibility of parole.¹⁴

On February 15, 2000, Broward County prosecutors reportedly offered to let Lionel plead guilty to second-degree murder in exchange for a sentence of three years in a juvenile center, one year of house arrest, ten years of psychological testing and counseling, and 1,000 hours of community service.¹⁵ However, Lionel, his mother, and his attorney, Jim Lewis, rejected the offer.¹⁶ The case took a bizarre twist when Lewis announced that he planned to argue that his client was imitating the moves he had learned from watching professional wrestlers on television.¹⁷ When Lewis sought to subpoena several pro-wrestling stars to testify at trial, including The Rock, Sting, and Hulk Hogan, the move prompted a backlash from attorneys representing the wrestlers.¹⁸ Lionel's defense is an "'I saw it on tv so I go free' excuse," exclaimed Jerry McDevitt, a Pittsburgh attorney who represents Dwayne "The Rock" Johnson.¹⁹ He "is a 12-year old punk who didn't learn that you don't beat up little girls."²⁰ The World Wrestling Entertainment, the largest organization of professional wrestling promotions, sued Lewis for libel.²¹

It was not until a hearing on May 4, 2000, on the issue of whether the use of the wrestling defense was acceptable that Ken Padowitz, Assistant State Attorney, first argued that Lionel committed aggravated child abuse and was guilty of felony-murder.²² Prior to that day, Padowitz had argued

12. *Id.*

13. Needle, *supra* note 8.

14. FLA. STAT. § 775.082 (1) (2003).

15. Paula McMahon, *Prosecutor Favors Lighter Sentence Leniency Pleas Ahead in Conviction of Tate*, SUN-SENTINEL (Ft. Lauderdale), Jan. 27, 2001, at 1A, available at 2001 WL 2655604.

16. *Id.*

17. *Id.*

18. Paula McMahon, *Judge Excuses Wrestlers from Testifying in Slaying Defense Says Suspect Was Mimicking Pros*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 2000, at 1A, available at 2000 WL 5652142.

19. *See id.*

20. *Id.*

21. Brad Bennett, *Attorney Second-Guesses Strategy*, MIAMI HERALD, Jan. 26, 2001, at 8A, available at 2001 WL 11643548.

22. *See* Paula McMahon, *Boy Re-enacts Final Moments of Girl's Life 6-Year-Old Died After Suffering Severe Injuries Prosecution Says Videotape Tainted*, SUN-SENTINEL (Ft. Lauderdale), May 5, 2000, at 1B, available at 2000 WL 5657578 [hereinafter McMahon I].

that Lionel had intentionally killed Tiffany Eunick.²³ Two weeks before the trial was to begin, on January 5, 2001, prosecutors again offered Lionel the same plea deal.²⁴ He rejected it a second time.²⁵ It was a decision that Lionel, his mother, and his attorney would come to regret. After deliberating just over three hours, jurors returned a verdict convicting the boy of first-degree felony-murder.²⁶ Under Florida law, the judge had no choice but to sentence Lionel to a term of life without the possibility of parole.²⁷ The prosecution used aggravated child abuse as the predicate offense for the felony-murder conviction of Lionel Tate,²⁸ a questionable move given that Lionel was too young to be tried as an adult for aggravated child abuse. In Florida, aggravated child abuse is a specific intent crime.²⁹ In convicting Lionel, the jury concluded that he had intended to abuse Tiffany and that the abuse resulted in her death.³⁰ Tate's case seems to be an instance where the

23. *See id.*

24. *Teen Rejects Deal*, SUN-SENTINEL (Ft. Lauderdale), Jan. 6, 2001, at 3B, available at 2001 WL 2652031.

25. *Id.* Can a twelve or thirteen-year-old child like Lionel Tate be expected to appreciate the consequences of pleading guilty to murder in adult court? Can he or she truly understand the jeopardy faced by rejecting a plea? Can a present-oriented, impulsive adolescent possibly fathom a sentence of life without the possibility of parole? These are just a few of the questions of "adjudicative competence" posed by the Lionel Tate case and others. Such questions, which raise concerns about the fundamental fairness of trying children as adults, were ignored by policymakers in their rush to pass punitive laws. The answers to these and other questions have been studied by the Research Network on Adolescent Development, an initiative funded by the John D. and Catherine T. MacArthur Foundation, and the results were recently published. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-63 (2003) (finding juveniles aged fifteen and younger were less likely to recognize the risks inherent in different choices and less likely to think about the long-term consequences of their choices, indicating that, compared to adults, juvenile offenders are probably not competent to stand trial in a criminal proceeding).

26. Paula McMahon, *Boy Convicted in Girl's Death, Verdict: First Degree Murder*, SUN-SENTINEL (Ft. Lauderdale), Jan. 26, 2001, at 1A, available at 2001 WL 2655383 [hereinafter McMahon II]. It is possible that a sentence of life without parole for a twelve-year-old convicted of felony-murder may be unconstitutionally "cruel and unusual" punishment under state constitutional law. *See* *People v. Dillon*, 668 P.2d 697, 727 (Cal. 1983) (holding that application of felony-murder rule to seventeen-year-old defendant is unconstitutional). Although, as a matter of federal constitutional law, that argument is unlikely to prevail in light of the United States Supreme Court's decision in *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding California's application of three strikes law in a case involving two consecutive twenty-five to life sentences for petty theft).

27. *See* § 775.082 (1).

28. McMahon I, *supra* note 22.

29. *See* § 827.03(2).

30. *See* McMahon II, *supra* note 26.

prosecution used felony-murder as a means to ease its burden of proof yet still get a first-degree murder conviction.

On appeal, Lionel Tate challenged his conviction on several grounds, including that the felony-murder rule should not apply to children, who at common law, were protected by the infancy defense, and that it was “cruel and unusual” punishment to sentence a twelve-year-old convicted of felony murder to life without the possibility of parole.³¹ On December 10, 2003, after this article had been finished, the Florida Court of Appeals reversed Tate’s conviction, holding that the trial court had erred when it failed to hold a post-trial hearing to determine if Tate was competent before sentencing Tate.³²

Although the Florida Court of Appeals reversed Tate’s conviction, it neither rejected nor directly resolved the issues raised by this article. With regard to the propriety of applying the felony-murder doctrine to a twelve-year-old, the Court held that the legislature had supplanted the common law infancy defense when it created laws allowing for juveniles to be prosecuted as adults.³³ Twelve-year-olds in Florida, at least those eligible to be tried as adults, are no longer presumed to be incapable of forming criminal intent.³⁴ The court also held that a life without parole sentence for a twelve-year-old child convicted of first-degree murder is not “cruel or unusual punishment” under the Florida Constitution or “cruel and unusual punishment” under the Eighth Amendment to the United States Constitution.³⁵ The court declined to address the specific question of whether life without parole for a twelve-year-old convicted of felony murder was unconstitutional, finding that the jury returned a “general verdict” of first degree murder.³⁶

Lionel Tate’s case was quickly resolved once the case was remanded to the trial court after the victorious appeal. Prosecutors offered Tate the same

31. Professor Drizin wrote parts of two amicus briefs filed before the Florida Court of Appeals in the Tate case. Copies of both of these briefs are available on-line on the website of the Juvenile Law Center at <http://www.jlc.org/>.

32. Tate v. Florida, 864 So. 2d 44, 44 (Fla. 4th Dist. Ct. App. 2003).

33. *Id.* at 53.

34. *Id.*

35. *Id.* at 54.

36. *Id.* at 54–55. At the time of Tate’s conviction, Article I, Section 17, of the Florida Constitution prohibited “cruel or unusual punishment.” The constitution was later amended in 2002 to prohibit “cruel and unusual punishment,” mirroring the language of the Eighth Amendment to the United States Constitution. In 1999, the Supreme Court of Florida, in *Brennan v. State*, 754 So. 2d 1 (1999), ruled that the death penalty was unconstitutional when applied to sixteen-year-olds because such a punishment was “unusual” in the history of Florida. As both the attorneys for Tate and amicus argued in Tate’s appeal, a life without parole sentence for a twelve-year-old was not only unusual in Florida but unprecedented in both Florida and the entire United States.

plea bargain that they had offered him on the eve of his earlier trial. This time Tate accepted the deal. Because he had already served nearly three years in prison, Tate was eligible for release. On January 29, 2004, Tate pleaded guilty to second degree murder and was released. He was fitted with an electronic bracelet which he will have to wear for one year while under house arrest, will remain on probation for ten years, is required to perform 1,000 hours of community service, and will receive regular psychological counseling.³⁷

B. Nathaniel Brazill

On May 26, 2000, the last day of school at Lake Worth Middle School, an assistant principal sent thirteen-year-old Nathaniel Brazill home for throwing water balloons.³⁸ Less than two hours later, just minutes before students were to go home for the summer, Brazill returned to the school with a small gun he had stolen from the residence of a family friend.³⁹ When thirty-five-year-old Barry Grunow, a language-arts teacher, refused to allow Brazill into his classroom to speak to two students, Brazill pulled out the gun and shot Grunow in the head.⁴⁰ These events were dramatically captured on a school video camera.⁴¹ After firing the single shot, Brazill turned to leave the school and pointed the weapon at another teacher who had come out of his classroom.⁴² Nathaniel left the school and was just blocks from the scene when he surrendered to a police officer.⁴³ He saw a police patrol car, raised his arms and kneeled.⁴⁴ He told the officer, "I shot somebody," and that he had a gun in his pocket.⁴⁵ Back at the police station, Brazill was interrogated by police officers and readily admitted shooting Mr. Grunow.⁴⁶ In a telling moment caught on videotape when the cameras were still rolling and while

37. See Paula McMahon, *Tate Enters Guilty Plea. Both Sides in Case Say Judges Should Have More Discretion in Sentencing Juveniles*, SUN-SENTINEL (Ft. Lauderdale), Jan. 30, 2004 at 1B, available at 2004 WL 67630226.

38. See Mitch Lipka, *Teacher Slain; Student Charged; Boy, 13, Faces First-Degree Murder Count; Shooting Occurs on Last Day of School*, SUN-SENTINEL (Ft. Lauderdale), May 27, 2000, at 1A, available at 2000 WL 22175569.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Lipka, *supra* note 38.

44. *Id.*

45. *Id.*

46. See *id.*

the officers were out of the room, Brazill put his head in his hands and cried, "What was I thinking?"⁴⁷

Prosecutors brought the case before a special grand jury, seeking charges of first-degree murder.⁴⁸ State Attorney Barry Krischer vowed to try Nathaniel as an adult from the beginning, wanting the young boy to serve "adult time for an adult crime."⁴⁹ As Krischer saw it, "juvenile court was never designed for 13-year-olds that pick up a gun and kill a teacher in cold blood."⁵⁰ At a meeting with spiritual and political leaders, just days after the shooting, Krischer stated that he did not feel he could try Nathaniel as a juvenile given the evidence of premeditation.⁵¹ Krischer felt he had little choice but to try Nathaniel as an adult because the evidence warranted a first-degree murder indictment.⁵² From the very beginning, in Krischer's mind, Nathaniel was guilty of "cold-blooded" or premeditated murder.⁵³ Charges of felony-murder were never discussed by Krischer or other prosecutors early on in the case. Instead, they insisted that Brazill intended to kill Grunow.⁵⁴

Before the grand jury issued the indictment, Nathaniel's parents implored prosecutors to try their son as a juvenile rather than an adult.⁵⁵ "We're not saying he shouldn't be punished for what he's done," said Nathaniel's father, "[b]ut as a child, not an adult."⁵⁶ On June 12, 2000, after hearing testimony and watching a video surveillance tape of the incident, twenty-one grand jurors indicted Brazill on first-degree murder and aggravated assault.⁵⁷ Days later, Nathaniel's attorneys formally entered a not

47. Susan Spencer-Wendel, *Brazill's Fate in Jury's Hands; Closing Arguments Take Nearly All Day*, PALM BEACH POST, May 15, 2001, at 1A, available at 2001 WL 18209138.

48. See Nicole Sterghos Brochu, *Boy Will Be Tried as Adult in Slaying; a Grand Jury Indicted the 13-Year-Old Student in Death of Teacher in Lake; Worth*, SUN-SENTINEL (Ft. Lauderdale), June 13, 2000, at 1A, available at 2000 WL 22179009.

49. *Id.*

50. *Nightline: Crime and Punishment, Should Children Who Commit Crimes Be Tried as Adults* (ABC television broadcast, May 31, 2000), LEXIS-NEXIS, Newsgroup File, Beyond Two Years [hereinafter *Nightline*].

51. See Nancy L. Othon, *Clerics, Political Leaders Fail to Sway Prosecutor*, SUN-SENTINEL (Ft. Lauderdale), June 9, 2000, at 22A, available at 2000 WL 22178191.

52. See *id.*

53. See *Nightline*, *supra* note 50.

54. See *id.*

55. See Mel Melendez, *Spare Child Adult Penalty, Dad Implores Father in Teacher Slaying Case Calls for Punishment*, SUN-SENTINEL (Ft. Lauderdale), Jun. 2, 2000, at 1A, available at 2000 WL 22176796.

56. *Id.*

57. Brochu, *supra* note 48.

guilty plea for their client, claiming that the shooting was an accident and that he did not intend to kill Barry Grunow.⁵⁸

The consequences of trying Nathaniel as an adult were severe. If convicted as an adult, he would face life in prison without parole.⁵⁹ Nathaniel would spend the years, up to his eighteenth birthday, in a juvenile branch of the adult prison system.⁶⁰ Upon reaching age eighteen, he would be transferred to an adult prison where he would remain without hope of parole.⁶¹ However, if Nathaniel was tried as a juvenile, he would spend his time in a juvenile detention center focusing on therapy and rehabilitation.⁶² He would be released on or before his twenty-first birthday.⁶³

The actions of Nathaniel Brazill shocked family, friends, and even school officials. The thirteen-year-old boy was an honor student at Lake Worth Middle School.⁶⁴ Teachers, including Barry Grunow, had recommended Nathaniel for the position of peer counselor for the following school year to help his classmates resolve their problems.⁶⁵ One neighbor recalled how Nathaniel would play the flute outside his mother's home. School officials noted that the boy had perfect attendance.⁶⁶ In addition, police were unable to find any evidence that Brazil had planned the school shooting in advance.⁶⁷

58. *Slaying Suspect Pleads Not Guilty*, SUN-SENTINEL (Ft. Lauderdale), June 20, 2000, at 3B, available at 2000 WL 22180292; see Jon Burnstein, *Grunow's Widow at Hearing She Sat Near Parents of Boy Facing Trial*, SUN-SENTINEL (Ft. Lauderdale), Aug. 25, 2000, at 5B, available at 2000 WL 22192927.

59. Spencer-Wendel, *supra* note 47.

60. Prior to the Tate case, juveniles convicted as adults for murder served their sentences in adult prisons. See Brochu, *supra* note 48. The outcry following the Tate verdict led the Florida General Assembly to change the law, enabling teenager defendants to start their prison sentences in juvenile facilities. Amazingly, in the Brazill case, Palm Beach County State Attorney Barry Kricher did not even know that Brazill would be serving time in adult prison when he pressed for the indictment. See *Nightline*, *supra* note 50. In an interview with Ted Koppel on ABC's *Nightline*, Krischer insisted that "there is no facility in the state of Florida that mixes fifteen-year-olds with adult population." *Id.*; see also William Raspberry, *Rush to Judgment*, WASH. POST, June 15, 2000, at A33, available at 2000 WL 19614572.

61. *Adults, Children, Crime, Punishment*, CHI. TRIB., June 16, 2000, 2000 WL 3675627.

62. *Id.*

63. *Boy Charged in Teacher's Slaying Prosecutor's Decry 13-year-old's Indictment as an Adult*, CHI. TRIB., June 13, 2000, available at 2000 WL 3674090.

64. Deborah Sharp, *Honor Student Might Be Tried for Murder as Adult 13-Year-Old Could Face Life in Prison in Slaying of Teacher at Florida School*, USA TODAY, May 30, 2000, at 6A, available at 2000 WL 5779538.

65. *Id.*

66. *Id.*

67. Jon Nordheimer, *Seventh-Grade Boy Held in Killing of a Teacher*, N.Y. TIMES, May 27, 2000, at A8, available at 2000 WL 21821469.

The .25 caliber Raven Arms pistol that Nathaniel Brazill used to shoot Barry Grunow belonged to a man characterized as Brazill's surrogate grandfather, Elmore McCray.⁶⁸ Just days before the shooting, Brazill spent the night at the man's home, took the unloaded gun and ammunition from a tin cookie box in McCray's desk, loaded it, engaged the safety, and hid it in his overnight bag.⁶⁹ On the day of the shooting, Brazill took the gun from his clothes drawer in his room and returned to the school with it.⁷⁰

Nathaniel Brazill's contention that he did not intend to shoot Barry Grunow was unwavering.⁷¹ Videotapes of Brazill's interrogation and confession show that Brazill consistently maintained that the shooting was an accident.⁷² This led defense attorney Robert Udell to recommend to the boy and his family that they reject the plea deal offered by the state about two weeks before the trial.⁷³ Under the offer, Brazill would serve twenty-five years in prison with a possibility of parole after serving twenty-one years.⁷⁴ He could have been released by the age of thirty-five.⁷⁵ The family agreed that rejecting the offer was in Nathaniel's best interests.⁷⁶

Nathaniel Brazill's trial began on May 2, 2001, a little less than one year after he shot Barry Grunow on the last day of seventh grade.⁷⁷ The defense made the decision to have Nathaniel testify on his behalf.⁷⁸ When questioned by prosecutors at trial, Nathaniel insisted that he had not meant to fire the gun, but that the shooting was an accident.⁷⁹ "I pulled the trigger, but

68. Nancy L. Othon, *Owner Hid Gun in Cookie Box "Gran" Says He Didn't Know It Was Missing—No Charges Filed Against McCray*, SUN-SENTINEL (Ft. Lauderdale), June 30, 2000, at 24A, available at 2000 WL 22182355 [hereinafter Othon I]; See generally *PrimeTime: Fatal Attraction; Hidden Camera Experiment Showing How Children and Teens are Irresistible (sic) Drawn to Guns, Even When They Should Know Better* (ABC television broadcast, Aug. 9, 2001) (showing that children are fascinated by guns and will play with them if they find them, even if warned just minutes before about the dangers of guns).

69. Othon I, *supra* note 68.

70. *Id.*

71. Jon Burstein, *Jury Must Decide Brazill's Intent in Teacher's Slaying*, SUN-SENTINEL (Ft. Lauderdale), April 29, 2001, at 1A, available at 2001 WL 2674507 [hereinafter *Jury Must Decide*].

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Jury Must Decide*, *supra* note 71.

77. Jon Burstein, *Jury Seated in Teen's Murder Case Opening Arguments Begin Today as Nathaniel Brazill Is Tried in the Death of a Lake Worth Teacher*, SUN-SENTINEL (Ft. Lauderdale), May 2, 2001, at 1B, available at 2001 WL 2675063.

78. *Jury Must Decide*, *supra* note 71.

79. *Teen on Trial: 'I Didn't Try' to Shoot Gun*, NEWSDAY, May 10, 2001, at A06, available at 2001 WL 9230836.

I didn't try to. That was an accident. Mr. Grunow was one of my friends," were the words spoken by Nathaniel at trial.⁸⁰ Although the teen showed little emotion during much of his testimony, when asked what Mr. Grunow did when he collapsed to the ground, Nathaniel replied, "What do you think he did?" and then began to cry.⁸¹

After less than a two-week trial, the two sides presented their closing arguments. The prosecution maintained that the killing was intentional, but added felony-murder to the list of possibilities, presumably to ensure a conviction.⁸² So when Judge Wennet addressed the jury, his instructions for first-degree murder included both premeditated murder as well as felony-murder, as requested by the prosecution.⁸³ Prior to closing arguments, the prosecution had made no mention of felony-murder.⁸⁴ A conviction for felony-murder would have mandated the same life sentence for Brazill as a conviction for intentionally killing Grunow.⁸⁵ For felony-murder, the death of Grunow had to occur as a consequence of and while Brazill was engaged in the commission of a burglary.⁸⁶ Section 810.02 of the *Florida Statutes* states that burglary "means entering or remaining in a dwelling, [or] a structure . . . with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain."⁸⁷ On the charge of burglary, "proof of the entering of such structure . . . at any time stealthily and without consent of the owner . . . is prima facie evidence of entering with intent to commit an offense."⁸⁸ The main issue for the burglary charge was whether Lake Worth Middle School was open to the public at the time Brazill entered. If it was open to the public, Brazill would have a complete defense to the charge of burglary.⁸⁹ If it was

80. *Id.*

81. Jon Burstein, *Prosecutor: Show How You Held the Gun Brazill Contradicts Testimony, Says Some Witnesses Lied, Then Breaks Down Briefly*, SUN-SENTINEL (Ft. Lauderdale), May 10, 2001, at 1A, available at 2001 WL 2676788.

82. See Jon Burstein, *Brazill's Mother: He's Still a Child-Mom of Teacher's Killer Says Her Son, 14, Deserves Another Chance in Life*, SUN-SENTINEL (Ft. Lauderdale), May 24, 2001, at 1B, available at 2001 WL 2679781.

83. Jon Burstein, *Brazill Judge Grants Request of Prosecutors—Brazill Judge Grants Request of Prosecutors*, SUN-SENTINEL (Ft. Lauderdale), May 11, 2001, at 28A, available at 2001 WL 2676965 [hereinafter *Brazill Judge*].

84. Jeff Shields, *Felony Murder: A Thorny Legal Issue—Jurors Face Point of Law in Decision*, SUN-SENTINEL (FT. LAUDERDALE), May 15, 2001, at 13A, available at 2001 WL 2677716.

85. *Brazill Judge*, *supra* note 83.

86. *Id.*

87. FLA. STAT. § 810.02(1)(a) (2001).

88. § 810.07(1).

89. *Brazill Judge*, *supra* note 83.

not open to the public, then the jury had to find that Brazill intended to commit aggravated assault with a firearm for him to be guilty of burglary and therefore felony-murder.⁹⁰

After fourteen hours of deliberation, the jury convicted Nathaniel Brazill of second-degree murder and aggravated assault with a firearm.⁹¹ One juror “didn’t think the evidence showed [Brazill] had intent to kill Mr. Grunow.”⁹² Another saw the boy’s actions as characteristic of a teenager, not a cold-blooded killer.⁹³ According to the juror, the boy just did not see the consequences of his actions.⁹⁴

Initially, there was speculation about the sentence that Brazill could receive, but Judge Wennet found that Florida law did not offer him any leeway in deciding Brazill’s sentence.⁹⁵ Florida’s “10-20-Life” gun violence law mandates that anyone convicted of killing someone with a gun be sentenced to no less than twenty-five years in prison.⁹⁶ Wennet did not agree with the defense that the law did not apply to children under sixteen.⁹⁷ Instead, the judge decided that since Brazill was tried as an adult, he had to be sentenced as one.⁹⁸ Prosecutor Marc Shiner asked for life without parole, stating,

90. Jury Instructions at 4–6, *Florida v. Brazill*, No. 00-6385CF A02 (Fla. 2001).

91. Mitch Lipka & Stella M. Chavez, *Brazill Guilty, 14-Year-Old Convicted of Second-Degree Murder, Jurors Weren’t Convinced of Intent to Kill, Jurors Initially Leaned 7-5 Toward First-Degree Verdict*, SUN-SENTINEL (Ft. Lauderdale), May 17, 2001, at 1A, available at 2001 WL 2678206. Even though the jury found Brazill guilty of aggravated assault with a firearm, that offense is not one of the specifically enumerated felonies for which a defendant can be guilty of felony-murder in Florida. See § 782.04(1)(a)(2)(a)(p).

92. Lipka & Chavez, *supra* note 91.

93. *Id.*

94. *Id.* One commentator, Paul Thompson, a neurologist at UCLA, believes that Brazill’s verdict of second-degree murder is consistent with scientific research. Paul Thompson, Editorial, *Brain Research Shows a Child Is Not an Adult*, SUN-SENTINEL (Ft. Lauderdale), May 25, 2001, at 31A, available at 2001 WL 2680069. Thompson cites his own research that has revealed that the teenage brain is not equipped to deal with risky impulses, which may explain why Brazill claimed he made a mistake in shooting Grunow. *Id.* According to Thompson, the verdict is in line with scientific research in that Brazill’s actions were not accidental but they were not completely thought-out either. See also Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 SUM. CRIM. JUST. 26 (2000) (adolescents often view the consequences of their actions as “accidental” when adults would have foreseen the consequences).

95. Jon Burstein & Shana Gruskin, *Judge Backs Off Life Term for Teen, Nathaniel Brazill Received 28 Years in Prison for Killing Barry Grunow*, ORLANDO SENTINEL, July 28, 2001, at C1, available at 2001 WL 9199512.

96. *Id.*

97. *Id.*

98. *Id.*

“[t]hat’s the only way we can be sure [Brazill] won’t hurt someone again.”⁹⁹ On July 27, 2001, Judge Wennet sentenced Nathaniel Brazill to twenty-eight years in prison without parole.¹⁰⁰ Nathaniel Brazill is currently housed in a youthful offender prison, and he will remain there until he is at least eighteen, at which point he will enter the adult prison system.¹⁰¹

Although both the Brazill and Tate trials are over and both defendants have begun serving their sentences, the debate over whether either should ever have been in an adult courtroom still rages. After the verdict was announced, Governor Jeb Bush expressed his dismay that Brazill was tried as an adult. “There is a different standard for children,” the Florida governor said. “There should be a sensitivity to the fact that a 14-year-old is not a little adult.”¹⁰² One juror also felt that the young boy’s case should not have come before an adult court. “Knowing what I know now,” said one juror, “I would say he should have been tried as a juvenile. He was a juvenile.”¹⁰³ Although the debate still rages concerning the appropriateness of trying and sentencing teenagers as adults, there is little or no debate about the prosecutorial practice, as in the Tate and Brazill cases, of using the felony-murder doctrine to make it easier to convict juveniles as adults.¹⁰⁴ The use of the felony-murder rule in the Brazill case was a stretch. It is hard to imagine that thirteen-year-old Brazill thought his public school was “private property,” especially during school hours. Nor is it likely that Florida legislators envisioned that the burglary statute would apply to Brazill’s actions.¹⁰⁵

A Florida appellate court affirmed Brazill’s conviction and sentence, finding that the broad discretion accorded to the prosecutor under the Florida legal system to seek indictment for a felony or allow a case to go to juvenile court did not violate the Constitution.¹⁰⁶ Describing a prosecutor’s discretion in deciding whether and how to prosecute as “absolute,” the court noted the

99. Amanda Riddle, *Fourteen-year-old Boy in Florida Gets 28 Years in Prison for Killing His Teacher*, SAVANNAH MORNING NEWS, July, 28, 2001, <http://www.savannahnow.com/stories/072801/LOCKillerap.shtml> (last visited Apr. 8, 2004).

100. Glenda Cooper, *Florida Teen Gets 28 Years in Teacher’s Shooting Death*, WASH. POST, July 28, 2001, at A03, available at 2001 WL 23183295.

101. Burstein & Gruskin, *supra* note 95.

102. *Boy is Guilty of Second-Degree Murder in the Shooting of a Teacher in Florida, 14-year-old Says He Meant Only to Scare Victim*, ST. LOUIS POST-DISPATCH, May 17, 2001, at A2, available at 2001 WL 4462045.

103. Lipka & Chavez, *supra* note 91.

104. An extensive review of newspaper articles and law review articles reveals that very little has been written about the appropriateness of applying the felony-murder doctrine to children.

105. See Steven A. Drizin, *Rule Should Not Apply to Children*, SUN-SENTINEL (Ft. Lauderdale), May 14, 2001, at 19A, available at 2001 WL 2677645.

106. *Brazill v. State*, 845 So. 2d 282, 289 (Fla. 4th Dist. Ct. App. 2003).

requirement that children thirteen and under may be prosecuted in adult court only by indictment of a grand jury actually serves to protect children against abuses of prosecutorial discretion because it requires grand jurors to concur with prosecutorial charging decisions.¹⁰⁷ Accordingly, the court held that Florida's statutory scheme for prosecuting juveniles as adults did not violate Brazill's equal protection or due process rights, or the separation of powers.¹⁰⁸ Although the court was not faced with an attack on the prosecutor's decision to use the felony-murder rule to obtain a conviction against Brazill, its ringing endorsement of prosecutorial discretion does not bode well for such future challenges.

C. Jonathan Miller

Thirteen-year-old Josh Belluardo died on November 4, 1998, after spending nearly forty-eight hours in a coma.¹⁰⁹ The parents of the middle-schooler made the difficult choice of taking their brain dead son off of life support.¹¹⁰ Josh ended up in the hospital after he was hit in the back of the head, kicked in the stomach, and hit in the face by fifteen-year-old Jonathan Miller.¹¹¹ On the afternoon of November 2, 1998, Josh spent the bus ride home from school being taunted and bullied by Jonathan.¹¹² He had pencils and paper wads thrown at him as the two rode home from their respective schools.¹¹³ Josh was in the eighth grade at E.T. Booth Middle School and Jonathan was in high school.¹¹⁴ When Josh got off the bus and began to walk toward his home in a quiet, middle-class town in Cherokee County, Georgia, Jonathan followed and laid the would be fatal blows on Josh.¹¹⁵ Josh's sister ran to him and held him in her arms.¹¹⁶ A neighbor raced over to help and saw that Josh was unresponsive and called the paramedics.¹¹⁷ Jonathan ran

107. *Id.*

108. *Id.*

109. Mark Bixler & Glenn Hannigan, *Cherokee Residents Mourn Loss of Teen, Student Accused of Beating 13-Year-Old After School May Be Charged with Murder Today*, ATLANTA J. & CONST., Nov. 5, 1998, at F01, available at 1998 WL 3724745; see Mark Bixler, *Teen faces adult trial in death, 15-year-old suspect held without bail after comatose beating victim, 13, dies*, ATLANTA J. & CONST., Nov. 6, 1998, at 1C, available at 1998 WL 3724863 [hereinafter *Teen Faces Adult Trial*].

110. *Teen Faces Adult Trial*, *supra* note 109.

111. Bixler & Hannigan, *supra* note 109.

112. *See id.*

113. *Id.*; *Teen Faces Adult Trial*, *supra* note 109.

114. *Teen Faces Adult Trial*, *supra* note 109.

115. Bixler & Hannigan, *supra* note 109.

116. *Id.*

117. *Id.*

with a friend to his home a few yards from the incident.¹¹⁸ Jonathan and Josh had been neighbors for years. Jonathan lived across a cul-de-sac from Josh.¹¹⁹

Initially, police charged Jonathan as a juvenile for aggravated battery.¹²⁰ Upon Josh's death, however, Jonathan was charged with murder, and Cherokee County prosecutors sought to transfer him from juvenile to adult court.¹²¹ On November 5, 1998, Jonathan appeared before Superior Court Judge Frank C. Mills, III, and was formally charged with murder as an adult.¹²² The judge ordered Jonathan held without bail, but Jonathan's lawyer, Michael B. Syrop, filed a motion asking that bond be set so that Jonathan could be out of custody until the case is resolved.¹²³ That issue was not immediately resolved.¹²⁴ In addition, the judge granted the lawyer's request that video cameras be removed from the courtroom because there had been threats on the teenager's life and this constituted a special situation under the Georgia law.¹²⁵

From the beginning, classmates, their parents, and the media characterized Jonathan as a bully, saying that he called people "faggots," teased classmates, and was generally a mean-spirited person.¹²⁶ However, Jonathan's attorney disputed the description and said that his client "didn't come across to [him] as the demon he's being portrayed as."¹²⁷ In response to the incident, a Georgia state representative, Chuck Scheid, introduced a bill targeted at bullies.¹²⁸ The bill would require schools, both public and private, to post the law in their classrooms and require school officials to "notify police and the parents of all students involved in a complaint of bullying."¹²⁹ Representative Scheid believed that schools protect bullies and that their conduct often goes unmentioned to parents and police.¹³⁰

118. *Id.*

119. *Id.*

120. Bixler & Hannigan, *supra* note 109.

121. *Id.*

122. *Teen Faces Adult Trial*, *supra* note 109.

123. *Id.*

124. See Mark Bixler, *Teen's Case Highlights Issue of Bond for Murder Defendants*, ATLANTA J. & CONST., Dec. 10, 1998, at 9JQ, available at 1998 WL 3730954 [hereinafter *Teen's Case Highlights Issue*].

125. See *id.*

126. *Id.*

127. Bixler & Hannigan, *supra* note 109.

128. Mark Bixler, *E.T. Booth Focuses on Memorials*, ATLANTA J. & CONST., Nov. 19, 1998, at 12JH, available at 1998 WL 3727109.

129. *Id.*

130. See *id.*

Jonathan Miller's lawyer successfully argued that the fifteen-year-old should be released on bond while he awaited trial.¹³¹ Judge C. Michael Roach set bond at \$50,000 and placed a series of conditions on Jonathan while on bond, despite protests from the murder victim's family.¹³² These conditions, stipulated to by Miller, were that he had to live at least fifteen miles from his neighborhood where the incident occurred, wear a monitoring device, and not contact any witnesses.¹³³

On December 14, 1998, prosecutors proceeded to indict Miller for first-degree murder.¹³⁴ Unlike the prosecutors in the Tate and Brazill cases, the Georgia prosecutors used Georgia's felony-murder law from the outset to get a first-degree murder indictment from the grand jury.¹³⁵ The underlying felonies cited by the prosecution were aggravated assault and aggravated battery.¹³⁶ So, in Georgia, in order to obtain a first-degree murder conviction, prosecutors only needed to convince jurors that Jonathan was guilty of aggravated assault.¹³⁷ The indictment said that Miller committed aggravated assault when he hit Josh with his hands and feet "about the head and body."¹³⁸

Only a few weeks after being released on bond and then indicted for first-degree felony murder, Judge C. Michael Roach ordered Jonathan Miller back to jail after the boy hosted a slumber party for several friends expected to testify against him.¹³⁹ The party was a direct violation of the bond agree-

131. *Teen's Case Highlights Issue*, *supra* note 124.

132. *Id.*

133. *Id.*

134. Mark Bixler, *Felony Murder Law Used in Cherokee Rule Allows Charge, Regardless of Intent*, ATLANTA J. & CONST., Dec. 16, 1998, at 2C, available at 1998 WL 3731847 [hereinafter *Felony Murder Law Used in Cherokee*].

135. *See id.*

136. *Id.* Although most states do not allow aggravated assault as the predicate felony, Georgia is an exception. In general, most states rely on some form of "independent felony" or "merger limitation" when employing the felony-murder rule. Under the limitation, felonious assault, voluntary manslaughter, and involuntary manslaughter are not eligible for use as the predicate felony. The rationale is that without this limitation, almost every felonious assault, voluntary manslaughter, or involuntary manslaughter could be turned into a felony-murder and the need for the distinction of a separate offense would be unnecessary.

137. *See Bixler & Hannigan*, *supra* note 109.

138. *Felony Murder Law Used in Cherokee*, *supra* note 134.

139. *Teen Back in Jail on Violation in Fatal Ga. Beating*, CHATTANOOGA TIMES FREE PRESS, Feb. 7, 1999, at B8.

ment.¹⁴⁰ Subsequently, a “flamboyant” Atlanta attorney, Bruce Harvey, joined the Jonathan Miller defense team.¹⁴¹

Jonathan Miller’s trial date was set for April 26, 1999. On April 20, 1999, just days before the trial was to begin, two boys, Dylan Klebold, age seventeen, and Eric Harris, age eighteen, opened fire on classmates at Columbine High School in Littleton, Colorado. The two boys killed twelve students and a teacher and wounded over twenty before turning the guns on themselves.¹⁴² In light of the events at Columbine, Miller’s attorneys tried unsuccessfully to get the trial delayed citing public concern over school violence following the Columbine murders as potentially influencing the jury.¹⁴³ However, Judge Roach denied the request and began jury selection immediately.¹⁴⁴

The jury selection for Miller’s trial took longer than anticipated given the Columbine incident and intense media coverage of that case.¹⁴⁵ Defense attorneys continuously argued that Miller could not receive a fair trial in the Atlanta metro area because of the media’s characterization of the beating and their client, and the media’s attempt to link the case to the Columbine case.¹⁴⁶ However, these arguments fell on deaf ears.¹⁴⁷ The prosecution’s witnesses were heard on May 5, 1999.¹⁴⁸ The defense maintained that Jonathan did not intend to kill Josh Belluardo, and that the teen was only guilty of involuntary manslaughter, not felony-murder as the prosecution claimed.¹⁴⁹ The prosecution continued to insist that Jonathan was guilty of aggravated assault or aggravated battery, and that under Georgia’s felony-murder law, he should be

140. *Id.*

141. Mark Bixler, *Youth getting famed lawyer, Cherokee teenager accused in fatal beating will be represented by Bruce Harvey*, ATLANTA J. & CONST., Apr. 8, 1999, at 2D, available at 1999 WL 3761120.

142. See Angie Cannon et al., *Why? There were plenty of warnings, but no one stopped two twisted teens*, U.S. NEWS & WORLD REPORT, May 3, 1999, at 16; Nancy Gibbs, *In Sorrow and Disbelief*, TIME, May 3, 1999, at 20.

143. *Judge Rejects Delay of Bus Stop Beating Trial*, CHATTANOOGA TIMES FREE PRESS, Apr. 27, 1999, at B2.

144. *Id.*

145. Mark Bixler, *Youth Trial Moving Slower Than Normal*, ATLANTA J. & CONST., May 1, 1999, at F1, available at 1999 WL 3767365.

146. See *id.*

147. *Id.*

148. Mark Bixler, *Victim’s Sister Testifies in Teen’s Trial: There was no Response When Katie Belluardo Went to Help Her Brother After He Was Punched, She Says*, ATLANTA J. & CONST., May 6, 1999, at B1, available at 1999 WL 3768690 [hereinafter *Victim’s Sister Testifies in Teen’s Trial*].

149. *Id.*

convicted of first-degree murder.¹⁵⁰ Meanwhile, defense attorney Bruce Harvey argued that the attack was only a misdemeanor assault or battery, and that under Georgia law, Miller was guilty of involuntary manslaughter if he were found to have committed a misdemeanor that unintentionally leads to death.¹⁵¹

Jonathan Miller's trial lasted just three days.¹⁵² The victim's sister took the stand and testified that she saw her brother on the grass outside their home, ran out to him, saw him gasp for air, and watched his face turn from red to purple to blue.¹⁵³ Others testified that Miller had taunted the victim often in the days preceding the attack.¹⁵⁴ Medical experts said that a torn artery in Josh's brain was the actual cause of the death.¹⁵⁵ The small tear in the artery allowed the brain cavity to fill with blood and leave the teenager brain dead.¹⁵⁶ After the prosecution finished presenting its case, the defense made the surprise announcement that it would not present any evidence or call any witnesses.¹⁵⁷

After only six hours of deliberation, the jury found Jonathan Miller guilty of felony-murder, aggravated assault, and aggravated battery.¹⁵⁸ The conviction meant an automatic life sentence for the teenager with the possibility of parole after fourteen years.¹⁵⁹ However, the judge could decide to impose a longer sentence for the aggravated assault and battery charges.¹⁶⁰ Following the verdict, attorneys for Jonathan Miller vowed to appeal on the basis of Judge Roach's denial to delay the trial until after the panic over the Columbine shootings had died down.¹⁶¹

150. *Id.*

151. *Id.* The "misdemeanor-manslaughter" rule permits conviction of involuntary manslaughter for an accidental homicide that occurs during the commission of an unlawful act not amounting to a felony (a dangerous misdemeanor) without the required showing that the defendant intentionally, knowingly, recklessly, or negligently caused the death. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.09, at 538 (3d ed. 2001).

152. *Boy Convicted in Killing Cites Littleton in Appeal*, N.Y. TIMES, May 9, 1999, at 17.

153. *Victim's Sister Testifies in Teen's Trial*, *supra* note 148.

154. *Id.*

155. Mark Bixler, *Cherokee teen found guilty of murder*, ATLANTA J. & CONST., May 8, 1999, at A1, available at 1999 WL 3769128 [hereinafter *Cherokee teen found guilty*].

156. *Id.*

157. Mark Bixler, *Cherokee Bully Case Goes to Jury Teen-On-Teen Crime: 15-Year-Old Facing Felony Murder or Involuntary Manslaughter Sentence in Neighbor's Death*, ATLANTA J. & CONST., May 7, 1999, at D1, available at 1999 WL 3768950 [hereinafter *Cherokee bully case*].

158. *Cherokee Teen Found Guilty*, *supra* note 155.

159. *Id.*

160. *Id.*

161. *Boy Convicted in Killing Cites Littleton in Appeal*, *supra* note 152.

One juror said that the jury had no choice but to convict Miller.¹⁶² According to the juror, Assistant District Attorney Rachelle L. Carnesale had proved the definitions of the charges against Miller, and the defense did little to rebut them when it failed to call any witnesses.¹⁶³ According to the juror, the most difficult part of the conviction was whether Miller was guilty of aggravated battery.¹⁶⁴ Under Georgia law, to be guilty of aggravated battery, the victim has to be deprived of the use of one of his body parts, in this case his brain.¹⁶⁵ The jury had trouble deciding whether Josh died instantaneously or not.¹⁶⁶ In the end, the jury decided that the young boy did not die instantly given the victim's sister's testimony that she found her brother gasping for air.¹⁶⁷

Judge Roach sentenced Miller to life in prison on May 21, 1999.¹⁶⁸ The judge said that he had no choice because Georgia law required a life sentence for a felony-murder conviction.¹⁶⁹ If Jonathan had been convicted of involuntary manslaughter, as the defense argued, his sentence would have been one to ten years in prison.¹⁷⁰

As in the Brazill case, some in the community argued that Miller should have been tried in juvenile court.¹⁷¹ "They can try him as an adult, but the reality is he's a kid. . . . Life in prison to me is going way too far," said Rick McDevitt, president of the Georgia Alliance for Children.¹⁷² Following the sentencing, Miller's attorneys said they would appeal the sentence because the punishment was cruel for a death that was unintended.¹⁷³ Months after

162. Ben Schmitt, *Cherokee Juror: Defense Didn't Give Us Much Choice*, FULTON COUNTY DAILY REPORT, May 11, 1999 available at .LEXIS, Nexis Library, Fulton File.

163. *Id.*

164. *Id.*

165. GA. CODE ANN. § 16-5-24(a) (2003).

166. See generally *Patrick v. State*, 274 S.E.2d 570 (Ga. 1981). If a victim dies instantaneously, the defendant cannot be subjected to aggravated battery. *Id.* at 572. On appeal, Miller's attorneys argued, among other things, that Josh Belluardo died instantaneously when he was hit, and therefore Jonathan could not have been guilty of aggravated battery. See Appellant's Brief in Support of His Appeal, *Miller v. State*, 571 S.E.2d 788 (Ga. 2002) (No. S02A0626); Appellant's Supplemental Brief in Support of His Appeal, *Miller v. State*, 571 S.E.2d 778 (Ga. 2002) (No. S02A0626).

167. Schmitt, *supra* note 162.

168. *Id.*

169. *Boy, 15, Gets Life in Bus Stop Killing*, CHATTANOOGA TIMES FREE PRESS, May 22, 1999, at B5.

170. Mark Bixler, *Teen Gets Life in Bus Stop Beating Death*, ATLANTA J. & CONST., May 22, 1999, at G1, available at 1999 WL 3772782.

171. *Id.*

172. *Id.*

173. *Appeal Planned of Life Sentence in Killing at Bus Stop*, CHATTANOOGA TIMES FREE PRESS, May 24, 1999, at B8.

being sentenced to life in prison, Jonathan Miller told reporters, "I'm not a murder – I shouldn't – I don't see myself as a murderer . . . I'm a good kid, but I just made a few mistakes in my life."¹⁷⁴

On May 2, 2002, Jonathan Miller's lawyers asked the Supreme Court of Georgia to reverse the conviction and grant the boy a new trial.¹⁷⁵ Miller raised several issues relating to the felony-murder doctrine, including whether Georgia's statutory scheme for trying juveniles as adults, which gives original jurisdiction to the criminal court over all thirteen to seventeen-year-olds charged with murder, applies to felony-murder cases, and whether it is proper to use aggravated assault to win a felony-murder conviction when life is lost unintentionally.¹⁷⁶ On October 28, 2002, the Supreme Court of Georgia rejected all of Jonathan's arguments and affirmed his conviction and sentence.¹⁷⁷ Although he concurred in the judgment, Justice Benham felt compelled to write a separate opinion in which he questioned the result:

While I concur in the majority opinion, I cannot help but believe that as we treat more and more children as adults and impose harsher and harsher punishment, the day will soon come when we look back on these cases as representing a regrettable era in our criminal justice system. As we were developing our juvenile justice system, we sought to treat children differently from adults because we recognized they had not developed the problem-solving skills of adults. We now lump certain children in the same category as adults and mete out harsh punishment to them, ignoring the differences between childhood and adulthood.¹⁷⁸

In the cases discussed above, most of the debate focused on the issue of whether the boys should have been tried as juveniles or adults.¹⁷⁹ In the Florida cases, there was little or no debate about the appropriateness of using the felony-murder rule to gain first-degree murder convictions against Brazill and Tate once these boys were prosecuted in adult court.¹⁸⁰ Although the use of the felony-murder rule was questioned by the lawyers in the *Miller* case, the attacks were premised on the propriety of using felony-murder as a

174. *They Called it Murder; Border Crossing* (CNN & TIME television broadcast, Sept. 19, 1999), available at LEXIS, News, CNN Transcripts.

175. D. Aileen Dodd, *Appeal Sought in Boy's '98 Punching Death*, ATLANTA J. & CONST., May 2, 2002, at D12, available at 2002 WL 3720956.

176. *See id.*; GA. CODE ANN. § 15-11-28(b)(2)(A)(i) (2001).

177. *Miller v. State*, 571 S.E.2d 788, 798 (Ga. 2002).

178. *Id.* at 798–99 (Benham, J., concurring).

179. *See id.*; *Brazill v. State*, 845 So. 2d 282 (Fla. 4th Dist. Ct. App. 2003).

180. *See supra* Part II.A–B.

predicate for transferring a juvenile to adult court, and the propriety of using aggravated assault or battery as a predicate for felony-murder, rather than a more broad-based attack on the appropriateness of using the felony-murder rule on teenage defendants. In the sections that follow, we will argue that the historical and doctrinal underpinnings of the felony-murder rule make little sense in the case of children and teenagers, and that old and new understandings of developmental differences between children and adults also make application of the felony-murder rule problematic in the cases involving child-defendants.

III. FELONY-MURDER RULE & TEENAGERS (HISTORY/SUMMARY/RATIONALE)

In cases like those of Lionel Tate, Nathaniel Brazill, and Jonathan Miller, the felony-murder rule imposes liability for murder when death results from actions taken during the commission or attempted commission of a felony. The rule applies in all situations—when the felon kills intentionally, recklessly, or accidentally. This rule allows prosecutors to charge a defendant with murder, even if the defendant did not intend to kill the victim. Prosecutors must only prove that the defendant intended to commit the underlying felony, and are not required to offer any separate proof of intent with regard to the death.

In response to criticism of the felony-murder rule, supporters of the rule offer deterrence, reaffirming the sanctity of human life, and easing the prosecutor's burden of proof as rationales for the rule.¹⁸¹ The most commonly cited defense of the felony-murder rule is deterrence, the hope of preventing negligent and accidental killings during the commission of felonies.¹⁸² The rule can also be viewed as reaffirming the sanctity of human life in that it reflects the view of society that a felony resulting in death is more serious than one that does not and, therefore, deserves greater punishment.¹⁸³

Finally, although not an explicit justification for the rule, easing the prosecutor's burden of proof is often the result because prosecutors can convict on a lesser level of intent than that required for murder.¹⁸⁴ Although these are the primary justifications for the rule, one commentator views them as mere pretenses. To LaFave, the most likely rationale behind the felony-murder rule is perhaps more retributive in nature: "that the defendant, because he is committing a felony, is by hypothesis a bad person, so that we

181. DRESSLER, *supra* note 151, § 31.01, at 516–19.

182. *Id.*

183. *Id.* § 31.01, at 517.

184. *See id.* § 31.01, at 518.

should not worry too much about the difference between the bad results he intends and the bad results he brings about."¹⁸⁵

The felony-murder rule is a much-condemned doctrine. In 1834, His Majesty's Commission on Criminal Law found the felony-murder rule "'totally incongruous with the general principles of our jurisprudence.'"¹⁸⁶ "Principled argument in favor of the felony-murder doctrine is hard to find."¹⁸⁷ In addition, the "ancient rule . . . has been bombarded by intense criticism and constitutional attack."¹⁸⁸ Moreover, "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine."¹⁸⁹ Such criticism led England to abolish the felony-murder rule by statute in 1957.¹⁹⁰ In the United States, although few states have abolished the felony-murder rule, others have limited its scope, but by and large the felony-murder rule still thrives in most jurisdictions.¹⁹¹

The felony-murder rule, which is codified in several states, cannot be traced to one clear source. In some instances, scholars have traced the first formal statement of the rule to Lord Dacre's Case, 1558.¹⁹² In Lord Dacre's Case, Lord Dacre and some companions were hunting in a park, an unlawful act, and agreed to kill anyone who might resist them.¹⁹³ One member of the hunting party killed a gamekeeper who confronted him.¹⁹⁴ Although not present during the confrontation, Lord Dacre and all the members of the party were convicted of murder and hanged.¹⁹⁵ Although accepted by many as an example of the felony-murder rule, some legal scholars believe the case is an early example of placing liability on the companions on a theory of constructive presence, or because the group had earlier agreed to the crime

185. WAYNE R. LAFAVE, CRIMINAL LAW § 7.5, at 682 (3d ed. 2000).

186. *People v. Aaron*, 299 N.W.2d 304, 319 (Mich. 1980).

187. MODEL PENAL CODE § 210.2 cmt. at 37 (Proposed Official Draft 1962).

188. *State v. Maldonado*, 645 A.2d 1165, 1171 (N.J. 1994) (citing *Aaron*, 299 N.W.2d at 327-29).

189. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine of Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985).

190. *See id.* at n.12.

191. *See* HAW. REV. STAT. § 701 (1993); KY. REV. STAT. ANN. § 507.020 (Michie 1999); *Aaron*, 299 N.W.2d at 321 (interpreting a Michigan statute where the rule is no longer recognized by statute). While in New Mexico, the state supreme court has effectively obliterated the rule by imposing a *mens rea* requirement for felony-murder. *See State v. Ortega*, 817 P.2d 1196, 1204 (N.M. 1991).

192. *See* Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956).

193. *Aaron*, 299 N.W.2d at 307.

194. *Id.* at 308.

195. *Id.*

and therefore had a shared *mens rea*.¹⁹⁶ Nevertheless, the case is the most often cited source of the felony-murder rule, although some scholars cite later sources such as Edward Coke, 1644,¹⁹⁷ or Sir Michael Foster, 1762, as promulgating the rule that a killing during a felony would automatically become a murder.¹⁹⁸ By 1769, the felony-murder rule was simply stated by William Blackstone: one who caused a death in the commission or attempted commission of any felony is guilty of murder.¹⁹⁹ In any case, the felony-murder rule can be traced back to the 1700s. As far back as the history of the rule can be traced, so can one trace condemnation of it.

A much criticized rule when applied to adults, the felony-murder rule is even more problematic when applied to children under the age of fourteen. Under the common law, such children are presumed to be incapable of forming criminal intent.²⁰⁰ The common law infancy defense can be stated as "children under the age of seven are conclusively presumed to be without criminal capacity, those who have reached the age of fourteen are treated as fully responsible, while as to those between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity."²⁰¹ The infancy defense reflects the law's "unwillingness to punish those thought to be incapable of forming criminal intent."²⁰² According to one scholar, "[t]he infancy defense was an essential component of the common law limitation of punishment to the blameworthy."²⁰³

This common law "infancy defense" dates back to the tenth century, when it was established by statute that no one under the age of fifteen could be subjected to capital punishment unless he attempted to escape or refused to give himself up.²⁰⁴ "[B]y the beginning of the fourteenth century, it was established that children under the age of seven were without criminal capacity."²⁰⁵ By 1338, children over the age of seven were presumed to lack the capacity to commit a crime, however this could be rebutted by proof of mal-

196. See *People v. Aaron*, 299 N.W.2d 304, 308 (Mich. 1980).

197. See James W. Hilliard, *Felony Murder in Illinois—The "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 25 S. ILL. U. L.J. 331, 332 (2001).

198. James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1442 (1994).

199. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 200–01 (1769).

200. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.11, at 398 (2d ed. 1986); see ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 938 (3d ed. 1982).

201. LAFAYE & SCOTT, *supra* note 200.

202. *In re Devon T.*, 584 A.2d 1287, 1290 (Md. Ct. Spec. App. 1991).

203. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 507 (1984).

204. LAFAYE, *supra* note 185, § 4.11, at 424–25.

205. *Id.* § 4.11, at 425.

ice.²⁰⁶ It was firmly established by the seventeenth century that the presumption of incapacity operated until a child was fourteen years old.²⁰⁷ Before the state could gain a conviction against a child, it had the burden of overcoming the presumption of incapacity.²⁰⁸

With the emergence of the juvenile court system it seemed that the infancy defense would become unnecessary. The juvenile court system acted as *parens patriae*, and the state became the punisher, substituting itself for the parents. The need to establish moral blameworthiness and, hence, the defense that it does not exist vanished.²⁰⁹ Indeed, many courts, citing the non-adversarial and non-punitive purposes of the juvenile courts, held that the infancy defense was unavailable to children tried in juvenile court.²¹⁰ However, the juvenile justice system has undergone considerable change over time and is becoming much more like a penal court. This trend, first noted by the United States Supreme Court in *In re Gault*²¹¹ and *In re Winship*,²¹² has only accelerated in the last decade as more and more juveniles are being tried in adult courtrooms.²¹³ In short, the infancy defense was once very important in protecting the child who faced criminal prosecution. However, the defense became less important in the early years of the juvenile

206. *Id.*

207. *Id.*

208. *See id.* According to LaFave, the prosecutor's burden was a heavy one, sometimes stated to be "beyond a reasonable doubt" and sometimes "clear and convincing evidence." LAFAVE, *supra* note 185, § 4.11, at 425.

209. *See Devon T.*, 584 A.2d at 1291. Some have argued that *In re Gault* and *In re Winship*, by bestowing upon juvenile defendants almost all of the same due process rights as adults, may have laid the foundation for the recent increase in laws permitting adult prosecution of juveniles. *See, e.g.,* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 89 (1999), available at <http://ncjrs.org/html/ojjdp/nationalreport99/toc.html>. *See generally* Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 323, 361-71 (1991). If juveniles are capable of exercising these "rights" as adults, or so the argument goes, then they should be held accountable as adults when convicted. *Id.*

210. *See, e.g.,* *State v. D.H.*, 340 So. 2d 1163, 1166 (Fla. 1976); *In re Davis*, 299 A.2d 856, 860 (Md. Ct. Spec. App. 1973); *In re Robert M.*, 441 N.Y.S.2d 860, 863 (Fam. Ct. 1981).

211. 387 U.S. 1 (1967).

212. 397 U.S. 358 (1969).

213. A 1998 Department of Justice study showed that almost 200,000 children under the age of eighteen are prosecuted in criminal court each year. *See* MACOLM C. YOUNG & JENNI GAINSBOROUGH, THE SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES 5 (2000), available at <http://www.sentencingproject.org/pubs/2079.pdf>. In addition, between 1992 and 1997, forty-seven states passed laws to make it easier to prosecute children as adult. *See* Snyder & Sickmund, *supra* note 209.

justice system; only recently has it gained relevance again as more and more juveniles are tried as adults.

A closer look at the justifications for the doctrine of incapacity and the felony-murder rule confirms that the felony-murder rule was not intended to be applied to children under the age of fourteen. The early common law infancy defense was based upon an unwillingness to punish those thought to be incapable of forming criminal intent, and not of an age where the threat of punishment would serve as a deterrent.²¹⁴ The felony-murder rule, in contrast, was justified as a deterrent for negligent and accidental killings during the commission of a felony,²¹⁵ or as means to punish those who do bad things generally.²¹⁶

In light of the presumption that children under age fourteen are incapable of forming criminal intent, the deterrence rationale makes no sense if applied to children. As for punishing those who do bad things, the juvenile justice system was designed to deal with the special needs of child defendants while still punishing them. Applying the felony-murder rule to children under the age of fourteen also produces unfair and nonsensical outcomes. By relieving prosecutors of the burden of rebutting the presumption of incapacity through proof of premeditation or malice, courts essentially would be permitting murder convictions of child-defendants who are presumed incapable of forming criminal intent. It is inconsistent with common law to make it easier for prosecutors to obtain a murder conviction in the case of youthful defendants, when the objective of the presumption of incapacity is just the opposite—to make it harder to prove intent when the defendant is a child.

Finally, the doctrine of incapacity must surely trump the felony-murder rule since “capacity” is a necessary foundation for the formation of “intent” in the culpability, or *mens rea*, context of a felony.

Put simply, *mens rea* is the state of mind required to commit a blameworthy act. The concept of legal responsibility, or the capacity to have a culpable state of mind, overlaps, in part, with *mens rea*. Unless an accused has the capacity to be culpable, it is impossible for him to maintain the specific mental state, or *mens rea*, required for commission of a criminal offense. Legal responsibility may also be viewed as a fundamental pre-requisite to the existence of *mens rea*. The *mens rea* inquiry focuses on whether the accused, when assumed capable of complying with the law’s

214. LAFAVE, *supra* note 185, § 7.5, at 425.

215. See DRESSLER, *supra* note 151.

216. See LAFAVE, *supra* note 185, § 7.5, at 671.

command, possessed the specific state of mind required to consider an act blameworthy. Legal responsibility focuses instead on the question of whether the accused's deficiencies of judgment distinguish him from others in society such that we do not expect him to comply with the law ... Legal responsibility and *mens rea* also differ in terms of the time frame in which the court analyzes the problem of culpability. The *mens rea* inquiry focuses on the time period in which the harmful act was committed. Proof of the capacity to be legally responsible for one's acts focuses on the life experience of the individual. By widening the time frame, legal responsibility differences allow the court to explore a broader range of behavior that might exculpate the accused.²¹⁷

In other words, capacity is the prerequisite for *mens rea*. In order for prosecutors to prove *mens rea*, they must first prove that the defendant was capable of forming criminal intent. But, especially when dealing with a child, this inquiry is much broader in scope than a traditional *mens rea* analysis and necessarily involves consideration of developmental factors which bear on a child's ability to form intent—factors which are incompatible with the felony-murder rule. It is to these developmental factors in which we now turn.

IV. PSYCHOSOCIAL RESEARCH & BRAIN RESEARCH

Courts applying the infancy defense typically focus on the child's capacity to understand the nature and consequences of his acts, and the ability to distinguish right from wrong.²¹⁸ Given current understandings about the moral development of children and psychosocial literature on the competence and decision-making of teens, courts exploring the infancy defense must also inquire into the degree of impulse control that the youth is capable of exercising.²¹⁹ Recent research showing that adolescent brains are less developed than adult brains in the very areas of the brain that govern impulse control and judgment—the prefrontal lobes—provides added weight to the need for courts to factor impulse control into the traditional infancy analysis.²²⁰

217. Walkover, *supra* note 203, at 537–38 (emphasis added).

218. *See id.* at 512.

219. *Id.* at 560; *see* Robert E. Shepherd, Jr., *Juvenile Justice: Rebirth of the Infancy Defense*, 12 CRIM. JUST. 45, 46 (1997).

220. *See, e.g.*, 3 HANDBOOK OF CHILD AND ADOLESCENT PSYCHIATRY 15, 37 (Lois T. Flaherty & Richard M. Sarles eds., 1997).

Although research on the development of the teenage brain in comparison to the adult brain is still in its infancy, recent studies have focused on the cognitive and psychosocial factors of adolescent development. Early studies concentrated on decision-making and cognitive aspects of development, and looked at teenagers' ability to reason, comprehend, "and appreciate decisions as adults would."²²¹ These studies were initiated in response to the legal changes surrounding medical decision-making and informed consent by young people.²²² Therefore, the findings, although helpful, do not answer all questions regarding teenage development. Instead, the studies show that teenagers, especially from age fifteen on, are not that much different than adults.²²³ However, criticism of the early studies reveals methodological flaws such as small, unrepresentative samples of mostly white, middle class subjects.²²⁴ A study of *Miranda* waivers by Thomas Grisso supports the contention that teenagers over fifteen are capable of understanding their *Miranda* rights as well as adults.²²⁵ However, Grisso stressed that the understanding of *Miranda* rights is only consistent when the teenagers and adults are of comparably average intelligence.²²⁶ When compared to adults with a similarly low I.Q., teenagers with a lower intelligence did not possess an equivalent understanding of their rights.²²⁷

Youth advocates used the cognitive similarities of adults and older teenagers professed by these studies to support an expansion of adolescent autonomy in the medical context for teenagers, especially to consent to abortion.²²⁸ However, these studies were used years later to attack the juvenile justice system and argue in support of teenagers being tried as adults in criminal courts.²²⁹ The argument was that if teenagers could make autonomous healthcare decisions, then they were equally capable of being tried as adults and making legal decisions.²³⁰ The juvenile justice system was based on the idea that juveniles were less competent or culpable than adults and a finding that their decision-making capabilities are equal to adults undermines the very laws and system meant to protect these differences.

221. Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406 (1999).

222. *See id.*

223. *Id.*

224. *See id.* at 407.

225. *See* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

226. *See id.* at 1164–65.

227. *See id.*

228. *See* Cauffman et al., *supra* note 221, at 408.

229. *Id.* at 408–09.

230. *Id.*

Researchers point to non-cognitive or psychosocial aspects of adolescent development to rebut the argument that teenagers and adults are not different.²³¹ Some of these psychosocial aspects include responsibility, which includes self-reliance, clarity of identity, and healthy autonomy; perspective, which relates to the ability to see the complexity of the situation and place it in a larger context; and temperance, or the ability to limit impulses and see the overall situation prior to acting.²³² According to Steinberg and Cauffman, early research shows that adolescents do differ from adults in many aspects of responsibility, perspective, and temperance, although more research is necessary.²³³ Other researchers examined similar aspects of psychosocial development, and all hypothesize that the development of different psychosocial aspects could impact how cognitive capacities are employed in real-world situations.²³⁴

By early adolescence, most children have reached “conventional” moral reasoning.²³⁵ At this stage, the adolescent’s moral reasoning is based on how others will judge his or her behavior.²³⁶ Elementary age children who have reached this level focus on pleasing their parents and other adults, while junior high school students are more concerned with the opinions of their peers.²³⁷ However, most adolescents are only capable of reasoning at this level in hypothetical situations, and their actual behavior often does not reflect their reasoning ability.²³⁸

By late adolescence or early adulthood, some individuals shift to “post-conventional” moral reasoning.²³⁹ At this level, reasoning switches from being concerned with social approval to more important principles like fair-

231. See generally Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1768 (1995); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 9–14 (1997); Elizabeth S. Scott et al., *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249 (1996).

232. See Cauffman & Steinberg I, *supra* note 231, at 1764–65.

233. See *id.* at 1788.

234. See Cauffman et al., *supra* note 221, at 412.

235. ABA, KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT 27 (Lourdes M. Rosado ed., 2000), available at <http://www.abanet.org/crimjust/juvjus/macarthur.html> [hereinafter KIDS ARE DIFFERENT].

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

ness and justice.²⁴⁰ However, this level of moral reasoning is rare, even in adults, and most adolescents follow only “conventional” moral reasoning.²⁴¹

In addition, research on the moral development of children shows that although children may be able to distinguish right and wrong, they may not behave in a way consistent with that understanding.²⁴² Also, the development of moral judgment results from the “interaction of impulse with the response of key externalities, such as parental approval or disapproval.”²⁴³

From a developmental perspective, it is grossly unfair to apply the felony-murder rule to pre-teens like Lionel Tate and Nathaniel Brazil. Such children, lacking the foresight and judgment of fully competent adults, are prone to make decisions without careful deliberation, and do not fully understand the consequences of their actions. Studies in both neuroscience and psychology demonstrate that children do not have the same capacity to control their behavior or make rational decisions as adults.²⁴⁴

V. POLICY RECOMMENDATIONS

In light of the historical and doctrinal arguments against the use of the felony-murder rule in cases involving children, there appears to be no good reason for retaining the felony-murder rule in cases involving children and teenagers. However, the felony-murder rule is deeply entrenched in the American legal system and has proven to be resistant to calls for its abolition for centuries. For this reason, we have proposed a number of solutions to limit the scope of the felony-murder rule in cases of children and teenagers. These limits are divided into three categories: 1) the use of the felony-murder rule against children tried in adult and juvenile court; 2) the use of the felony-murder rule as a basis for transferring children and teenagers to the adult court; and 3) the use of the felony-murder rule as mitigation in sentencing juvenile offenders in adult court.

A. *Limiting the Use of the Felony-Murder Rule in Juvenile and Criminal Court Cases*

First, we believe that there should be an absolute ban on the felony-murder doctrine for child defendants under the age of fourteen in adult and

240. KIDS ARE DIFFERENT, *supra* note 235, at 27.

241. *Id.* at 28.

242. See Walkover, *supra* note 203, at 542.

243. *Id.* at 542–43.

244. See *id.* at 542; Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (2000).

juvenile court systems.²⁴⁵ As argued above, at common law, such children were presumed to be unable to form the criminal intent necessary to prove the underlying felony. Even if the State can rebut the presumption of incapacity, none of the traditional justifications of the rule make sense in the context of children under the age of fourteen.

The least compelling justification of all is probably the one that explains the longevity of the felony-murder rule: it eases the prosecution's burden of proving intent in murder cases. It is the least compelling because it is debatable as to whether we should ease the prosecution's burden for a crime that can carry the death penalty or life without possibility of parole, and especially debatable when child defendants are involved. As the Lionel Tate case demonstrates, children under fourteen now face similar draconian penalties if tried and convicted as adults. Because youth has historically been a mitigating factor in punishment, we should make it harder, not easier, to impose such sentences on youthful defendants.

For children ages fourteen to seventeen, we propose a presumptive ban on using the felony-murder rule. Children in this age range can probably form the criminal intent of the underlying felony but they still do not have the same capacity to control their behavior as adults, and often are less capable of foreseeing the consequences of their actions. Their brains are still developing in the pre-frontal cortex, the very area which governs deliberation, judgment, and impulse control, and the part of the brain which is arguably the seat of *mens rea*. In addition, some of these children, especially fourteen-year-olds and older teens who are mentally limited, may not be competent to stand trial.²⁴⁶ In order to charge fourteen to seventeen-year-olds with

245. Most courts have held that the common law presumption of incapacity does not apply in juvenile court proceedings. See LAFAYE, *supra* note 185, § 7.5, at 427–28. The reason for this rule has been that the infancy defense is unnecessary in light of the juvenile court's rehabilitative and non-punitive purposes. See *id.* § 7.5, at 428. This rule continues to be the prevailing rule despite the fact that the modern juvenile court is far more punitive than its predecessors. See Shepherd, *supra* note 219, at 46 (applying the felony-murder rule, which has the effect of making it easier to convict and punish juveniles, in a “rehabilitative” juvenile court makes little sense).

246. For the most recent study, see Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003), available at http://www.childrensrights.org/Policy/policy_resources_juvenile_juveniles_competence.htm. See also Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003); Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in YOUTH ON TRIAL 87 (Thomas Grisso et al. eds., 2000). See generally Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL 146–52 (Thomas Grisso et al. eds., 2000); Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Mak-*

felony-murder, prosecutors should bear a heavy burden. They should be required to prove by “clear and convincing” evidence that the defendant is a fit subject for application of the felony-murder rule. This burden can be met by evidence that the defendant was capable of forming the criminal intent of the underlying felony; that the alleged offense was committed in an aggressive or violent manner; that death or great bodily harm is a natural and probable consequence of the defendant’s actions; and that the defendant’s actions are the proximate and legal cause of the victim’s death.²⁴⁷

The above-mentioned rules seek to constrain the application of the felony-murder rule to children and teenagers who are tried in the adult court. In other words, they seek to impose restrictions on the ability of prosecutors to charge children and teenagers in adult court with first-degree murder under a felony-murder theory. We also believe that judges, prosecutors, and legislators should be constrained from using the felony-murder rule as a basis for transferring children and teenagers to the adult court in the first instance. Under such a rule, prosecutors could no longer seek an indictment for murder based strictly upon a felony-murder theory in order to prosecute a juvenile in adult and legislators should carve out an exception for felony-murder when drafting statutes that require that cases involving juveniles charged with murder must originate in the criminal, rather than the juvenile court.

B. Limiting the Use of the Felony-Murder Rule to Transfer Cases to the Adult Court

In the 1990s, in response to an alarming increase in juvenile violence, many states enacted tough transfer laws.²⁴⁸ Using the sound bite “adult time

ing of Delinquent Youths, in *YOUTH ON TRIAL* 33 (Thomas Grisso et al. eds., 2000). To ensure that child-defendants who clearly lack the capacity to be tried as adults are not wrongfully sent to the criminal courts, all children should engage in competency hearings prior to any transfer decision. Informal research revealed that only one state, Virginia, requires a hearing on a youth’s competence to stand trial before waiver to criminal court. *See* VA. CODE ANN. § 16.1-269.1 (Michie 2003). Arkansas requires a transfer hearing but competence is only one factor in a list of many that is considered by the judge in determining whether to transfer. *See* ARK. CODE ANN. § 9-27-318(g) (Michie 2002).

247. *See generally* LAFAVE, *supra* note 185, § 7.5, at 671–72. These circumstances track the ways in which courts have sought to limit the felony-murder rule to mitigate its harshness. *See id.*

248. In the decade from 1984 to 1994, the number of murders committed by youth nearly tripled from 823 to 2320. The overall serious violent crime rate (including homicide, rape, robbery, and aggravated assault) among youths aged twelve to seventeen also soared — from twenty-nine offenses per 1000 youth in 1986 to fifty-two in 1993. *See* RICHARD A. MENDEL, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS -- WHAT DOESN’T, Am. Youth Policy Forum, 30–31 (2000). As Frank Zimring has demonstrated:

for adult crime” as their mantra, critics of the juvenile court pushed for laws to make it easier to prosecute juveniles as adults.²⁴⁹ Their successful efforts produced a legal response to serious and violent juvenile crime, which flushed pre-teens, first-time offenders, and even non-violent offenders into an adult criminal court system that had all but abandoned the concept of rehabilitation. As a result of harsh mandatory minimum sentencing policies, the abolition of parole, and “truth-in sentencing laws,” which required convicted defendants to serve most or all of their prison terms, criminal court judges could no longer use youthfulness to mitigate sentences.

These new transfer laws differed from past practices. Historically, transfers had been reserved for older teens who were recidivists or who had committed especially heinous crimes. Since the United States Supreme Court’s 1966 decision in *Kent v. United States*,²⁵⁰ judicial waiver had been the most common approach to transferring juveniles to criminal court.²⁵¹ The *Kent* decision enumerated a list of substantive factors to guide judges in making transfer decisions, and many states simply adopted these standards in

[T]he most important reason for the sharp escalation in homicide [among offenders 13 to 17] was an escalating volume of fatal attacks with firearms ... That homicide increases are only gun cases has two important implications. First, it would require only a small number of attacks to change the death statistics during the 1985 to 1992 period. Because gunshot wounds are deadly, a relatively small number of woundings can produce a relatively large number of killings ... The second implication of the guns-only pattern is that the hardware used in many attacks seems to be the major explanation for the expanding rate rather than any basic change in the youth population involved in the assaults.

FRANKLIN ZIMRING, AMERICAN YOUTH VIOLENCE 35–36 (1998). For the best introduction to the theory and practice of transfer, see JEFFREY FAGEN & FRANKLIN ZIMRING, *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* (2000). See generally Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, 83–135 (2000), for a history of the statutory exclusion of specific offenses, including murder.

249. MENDEL, *supra* note 248. It’s hard to pinpoint who coined the phrase “adult time for adult crimes,” but the phrase clearly permeated the political scene in the mid-1990s. In fact, virtually every major Republican gubernatorial candidate in the mid-1990s mouthed the words. See, e.g., Laurence Hammack, ‘Compassion’ May Be Lost Gov. Allen Accepts Report That Proposes Tougher Penalties on Juvenile Offenders, *ROANOKE TIMES & WORLD NEWS*, Oct. 6, 1995, at C1; Jon R. Sorensen, *Pataki Plan on Juvenile Offenders Includes Longer Sentences in Adult Jails*, *BUFFALO NEWS*, Dec. 10, 1995, at 16A; *Governor Pete Wilson of California Sets State Agenda* (Transcript # 1777-10, Nat’l Pub. Radio Morning Ed., Jan. 9, 1996); Editorial, *The Young Killers: Adult Crimes Warrant Adult Time*, *WORCESTER TELEGRAM & GAZETTE*, June 10, 1996, at A6; Judy Putnam, *Engler Proposes ‘Punks’ Do ‘Adult Time for Adult Crimes’*, *GRAND RAPIDS PRESS*, July 27, 1995, at C3. For a history of juvenile transfer laws, dating from the inception of the juvenile court, see David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 699 (2002).

250. 383 U.S. 541 (1966).

251. See *id.* at 556.

their juvenile codes verbatim or with minor modifications.²⁵² The 1990s revolution in the transfer laws, however, differed from past efforts to try more children as adults in two significant ways: 1) the decision to transfer was less often a judicial decision; it was now increasingly the province of prosecutors or the legislatures; and 2) younger children could now be tried as adults for a wider array of offenses.²⁵³

Although judicial waivers used to make up the bulk of the children in adult court, today, prosecutorial and legislative waivers predominate. In 1997, for example, an estimated 8400 juveniles were waived from juvenile court to adult court by judges.²⁵⁴ Because prosecutorial waivers and legislative waivers, however, are more difficult to track, it is currently not known how many total youths under eighteen years of age are prosecuted as adults each year, but at least one estimate places the number as high as 200,000.²⁵⁵ A recent multi-jurisdictional study of adult courts in eighteen large urban counties revealed that eighty-five percent of all transfer decisions during a six-month period from January 1, 1998 to June 30, 1998 were made by prosecutors (45%) and/or legislatures (40%), instead of judges.²⁵⁶

The shift from a transfer regime in which judges made most of the decisions to one in which prosecutors and legislatures do the deciding necessarily means that the system has become more rigid and less flexible in deciding which juveniles stay in juvenile court and which are tried as adults. Legislative waivers are typically based on only two factors: the minor's age at the time of the offense and the nature of the alleged offense.²⁵⁷ Prosecutorial

252. *Id.* at 566–67. These factors include the seriousness of the offense, prosecutorial merit, the sophistication and maturity of the child, the child's past history of delinquency, responses to prior juvenile court efforts at rehabilitation, and the ability of the juvenile court's dispositions to rehabilitate the child and protect the public. *Id.*

253. Twenty-three states now have at least one provision, typically governing children charged with murder or other violent felonies, which places no bottom age limit for juveniles to be transferred to criminal court. See SNYDER & SICKMUND, *supra* note 209, at 106.

254. EILEEN POE-YAMAGATA & MICHAEL A. JONES, BUILDING BLOCKS FOR YOUTHS, AND JUSTICE FOR SOME 2 (1998), available at <http://www.buildingblocksforyouth.org/justiceforsome>.

255. *Id.* at 13; see SNYDER & SICKMUND, *supra* note 209, at 106. Not all of the estimated 200,000 youths under eighteen who are prosecuted as adults each year are "transfers." Many of these youths come from the thirteen states where the upper age limit for juvenile court jurisdiction is fifteen or sixteen, meaning that their cases originate in adult court and that they are considered "adults" as soon as they are arrested for a crime. *Id.*

256. JOLANTA JUSZKIEWICZ, BUILDING BLOCKS FOR YOUTHS, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2001), <http://www.buildingblocksforyouth.org/ycat/ycat.html>.

257. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 210 (1999).

waiver decisions are often based on three factors: 1) the minor's age; 2) the seriousness of the alleged offense; and 3) the minor's criminal history.²⁵⁸ The minor's amenability to treatment, social and emotional age, family background, and mental and intellectual capacity are not often available at the time that prosecutors decide to seek a transfer.²⁵⁹ Waiting to acquire such information is often a luxury most prosecutors believe they cannot afford, especially in cases in which a victim has died.

We agree that in many cases, the seriousness of the offense should be a significant factor in the transfer decision. Many felony-murders, however, are not among the most "serious offenses." The underlying crimes can be less serious but can still result in the unintentional or unforeseeable result of the victim's death. For this reason, we propose that children charged with felony-murder should not be eligible for legislative or prosecutorial waiver, unless the underlying felony could itself have led to a transfer to adult court. This is the rule which has been adopted in New York. For example, in *People v. Roper*,²⁶⁰ the New York Court of Appeals overturned a juvenile defendant's conviction for felony-murder because the child-defendant could not have been tried for the underlying felony in adult court.²⁶¹ The court noted that murder in the first-degree requires "felonious intent," which in felony-murder cases comes from the underlying felony.²⁶² Since *Roper* could not be charged as an adult with the "felony" of robbery, he lacked the implied intent necessary for felony-murder.²⁶³

In judicial waiver hearings, which typically involve a weighing of factors relating to the seriousness of the offense, the minor's criminal history, and the minor's prospects for rehabilitation before reaching the age of majority, there should be a presumption against transferring juveniles to adult court on felony-murder charges; a presumption which can be overcome with evidence that the underlying felony was committed in an aggressive, violent, premeditated, or willful manner. At the very least, minors who are waived to adult court on felony-murder charges should be given the opportunity to have "reverse waiver" hearings, hearings in which criminal court judges have the ability to send juvenile defendants back to juvenile court, either for their trials or for sentencings. Such hearings act as a check against prosecutorial

258. See Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1006-07 (1995).

259. See *id.* at 1007-08.

260. 259 N.Y. 170 (1932).

261. *Id.* at 177.

262. *Id.*

263. *Id.*

overcharging and ensure that only the most culpable juveniles are eligible for adult prosecution.²⁶⁴

C. Limiting the Death Penalty and Life Without Parole Sentences in Cases of Juvenile Felony-Murder

Finally, we believe that felony-murder convictions of sixteen and seventeen-year-olds should be exempted from the death penalty in the twenty-two states²⁶⁵ that permit it and children of all ages who are convicted of felony-murder should be exempted from the sentence of life without the possibility of parole. Such draconian sentences should be reserved for the most culpable offenders, and both the youth of juvenile defendants and the fact that they committed "felony-murder" should exempt them from this class of offenders.²⁶⁶ When a reduced level of intent is used to convict, a reduced sentence should be handed down.

264. Approximately twenty-four states have "reverse waiver" statutes. See SNYDER & SICKMUND, *supra* note 209. Such statutes are especially important in jurisdictions that rely extensively on legislative and prosecutorial waivers. In these jurisdictions, reverse waiver can act as a check against overcharging by prosecutors by allowing for an examination of the minor's role in the alleged offense, potential for rehabilitation, and other factors beyond the minor's age, and the seriousness of the charged offense. Reverse waiver statutes also mitigate the consequences of overly broad transfer statutes that sweep into criminal court accomplices, non-violent, first-time offenders, and defendants charged with felony-murder. See Tanenhaus & Drizin, *supra* note 249.

265. ABA JUVENILE JUSTICE SYS., CRIMINAL JUSTICE SECTION, FACTSHEET: THE JUVENILE DEATH PENALTY (2003), http://www.abanet.org/crimjust/juvjus/factsheet_general.pdf.

266. In *Atkins v. Virginia*, the United States Supreme Court ruled that the execution of the mentally retarded violates the "cruel and unusual punishment" clause of the United States Constitution. 536 U.S. 304, 321 (2002). Among the reasons cited for this decision was the majority of the Court's belief that the mentally retarded, because of their limited mental capacity, were less culpable than adult offenders of average intelligence. *Id.* In the wake of *Atkins*, the dissent of Justices Stevens, Ginsburg, and Breyer to the denial of certiorari in the case of *Toronto Patterson*, urged the full Court to revisit the issue of whether it is still constitutional to execute children over the age of fifteen. *Patterson v. Texas*, 536 U.S. 984 (2002) (Stevens, J., dissenting). Many of the same arguments for reduced culpability of the mentally retarded have already been argued in the cases of juveniles on death row. See *In re Stanford*, 537 U.S. 968 (2002) (Stevens, J., dissenting); Brief for Petitioner on Petition for Writ of Certiorari to the Texas Court of Criminal Appeal, *Beazley v. Cockrell*, 534 U.S. 945 (2001) (No. 00-10618), available at <http://www.abanet.org/crimjust/juvjus/Beazleycert02.pdf>; Brief for Petitioner on Petition for Writ of Certiorari to the Texas Court of Criminal Appeal, *Patterson v. Cockrell*, 536 U.S. 967 (2002) (No. 01-10028), available at <http://www.abanet.org/crimjust/juvjus/supreme%20court%20petition.pdf>.

VI. CONCLUSION

The cases which we have highlighted in this article—Lionel Tate, Nathaniel Brazill, and Jonathan Miller—highlight the unfairness of applying the felony-murder doctrine to cases involving children and adolescents, and illustrate the devastating consequences that result when the doctrine is used to secure murder convictions against youthful defendants in criminal court. In Lionel Tate's case, a boy who may not have been competent to stand trial for murder—he was unable to decide on his own whether to take a reasonable plea offer or roll the dice by going to trial—was convicted and sentenced to life in prison without parole. In Nathaniel Brazill's case, a boy whose emotions overcame his judgment and who, upon reflection, could not even understand what had caused him to kill his favorite teacher, was convicted and sentenced to twenty-eight years in prison. In Jonathan Miller's case, a boy who neither intended to kill his victim, nor could have foreseen that the boy would die from a punch to the head, was convicted and sentenced to life in prison. Applying the felony-murder rule in such cases borders on "cruel and unusual punishment" because the connection between culpability and punishment is severed in two ways. By allowing a defendant to be punished for a crime he did not intend to commit and for results he did not intend to cause, the rule takes a first cut at the connection between culpability and punishment. When the rule is applied to children and teenagers, the rule takes a second, and perhaps even deeper, cut—it denies the historical connection between youth, culpability, and punishment, a connection which is supported by developmental psychological research and more recent studies of the structure and function of the teenage brain.²⁶⁷

The felony-murder rule has proven to be extremely resistant to the many attacks which have been leveled against it throughout the ages. It continues not only to survive, but to thrive, in many jurisdictions throughout the United States. It should no longer be allowed to thrive in cases involving children and teenagers.

267. See Kim Taylor-Thompson, *States of Mind, States of Development*, 14 STAN. L. & POL'Y REV. 143 (2003) (arguing for a developmental analysis of mens rea concepts).

2003 SURVEY OF JUVENILE LAW

MICHAEL J. DALE*

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I. INTRODUCTION

The Supreme Court of Florida has decided a very important issue concerning appellate practice in termination of parental rights cases, ruling that the United States Supreme Court doctrine established in *Anders v. California*,¹ regarding an attorney's withdrawal from an appeal for lack of appealable issues in a criminal case, did not apply to termination of parental rights cases.² The Supreme Court of Florida set forth a less onerous standard of withdrawal.³ The doctrine of prospective neglect has been at issue in a number of cases in Florida's intermediate appellate courts over an extended period of time, including the time period addressed by this article, and no consensus has yet been reached regarding application of the doctrine.⁴ The opinions rendered by the district courts of appeal continue to be in conflict over proper application of the doctrine.⁵ On the delinquency side, the appellate courts continued the longstanding practice of holding the trial courts strictly

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1. 386 U.S. 738, 744 (1967).

2. N.S.H. v. Fla. Dep't of Children & Family Servs., 843 So. 2d 898, 900 (Fla. 2003).

3. *Id.* at 904.

4. *See, e.g.*, F.L. v. Dep't of Children & Families, 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003).

5. *See id.* at 1124.

responsible for compliance with statutory provisions, including proper notice to children of their right to counsel⁶ and proper application of dispositional statutes.⁷ Legislative activity was limited during the past year, although a major change occurred in the placement of the guardian *ad litem* program, which moved from the Supreme Court of Florida to the Justice Administrative Commission.⁸

II. DEPENDENCY

Florida case law and prior surveys in this Journal have reported on corporal punishment as one of the bases for a finding of dependency.⁹ The question under Florida law is whether corporal punishment is excessive enough to qualify as abuse.¹⁰ In *O.S. v. Department of Children & Families*,¹¹ the appellate court held that the evidence established substantial bruising over a majority of the child's buttocks, legs, and neck and that some of the bruises were still present six weeks later.¹² The child also testified that this was not the most severe beating she had received.¹³ The appellate court upheld the trial court's fact-finding, distinguishing cases in which the court found that bruises were insignificant, did not constitute temporary disfigurement, and did not put the child at risk of imminent abuse or cause the child to suffer significant mental impairment.¹⁴

An important question of how to prove the grounds for dependency was before the Fourth District Court of Appeal in *D. Children v. Department of Children & Family Services*.¹⁵ *D. Children* involved charges against both parents, the father claimed he was not at home at the time the infant was in-

6. *E.g.*, *A.L. v. State*, 841 So. 2d 676 (Fla. 4th Dist. Ct. App. 2003).

7. *E.g.*, *Fisher v. State*, 840 So. 2d 325 (Fla. 5th Dist. Ct. App. 2003).

8. FLA. STAT. § 39.8296 (2003).

9. See Michael J. Dale, *Juvenile Law: 2001 Survey of Florida Law*, 26 NOVA L. REV. 903, 915 (2002).

10. *Id.* Parents can also be charged with criminal child abuse for excessive corporal punishment. § 39.01(30)(a)(4). Parental immunity is not a defense to criminal child neglect. *Radford v. State*, 828 So. 2d 1012, 1019–20 (Fla. 2002) (citing *State v. McDonald*, 785 So. 2d 640, 642 (Fla. 2d Dist. Ct. App. 2001)).

11. 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).

12. *Id.* at 1148.

13. *Id.*

14. *Id.* at 1147–48 (citing *J.C. v. Dep't of Children & Families*, 773 So. 2d 1220, 1221 (Fla. 4th Dist. Ct. App. 2000); *R.S.M. v. Dep't of Health & Rehab. Servs.*, 640 So. 2d 1126 (Fla. 2d Dist. Ct. App. 1994)); see also *W.H. v. Dep't of Children & Family Servs.*, 846 So. 2d 636, 639 (Fla. 2d Dist. Ct. App. 2003); *K.R. v. Dep't of Children & Families*, 784 So. 2d 594, 597 (Fla. 4th Dist. Ct. App. 2001).

15. 820 So. 2d 980 (Fla. 4th Dist. Ct. App. 2002).

jured, although he was charged and a dependency finding was made as to him.¹⁶ The mother, however, was at home and dependency was also found as to her.¹⁷ In a split opinion, the appellate court held that the dependency as to the father would still be affirmed; even assuming he was not home at the time of the infant's injury.¹⁸ Moreover, the majority held that the trial court did not abuse its very broad discretion.¹⁹ Specifically, the court held that there was ample evidence to support dependency as to the mother, the perpetrator was not identified, and there was an intact family.²⁰ The court also relied upon an earlier case, *In re B.J.*,²¹ where a parent's rights were terminated, even though there was no evidence that the parent had inflicted any abuse.²² The court stated "where there is evidence that a child suffered abuse by one or both of the parents present, there is clear and convincing evidence of egregious abuse to support termination of parental rights of both parents."²³

Judge Warner dissented in the *D. Children* case.²⁴ First, she distinguished *In re B.J.* on the facts.²⁵ Specifically, she noted that the abuse occurred when the mother was in the residence.²⁶ In the case at bar, according to the dissent, there was no evidence that the father was at home when the abuse occurred, nor was there any evidence to suggest that the injuries occurred at any time when the father was at home.²⁷ Although the majority opinion states that it does not "accept as a given, that the father was not in the home at the time the injury occurred," there was no evidence to support that fact unless one rejects the parties' unreported testimony as not credible.²⁸ Thus, the majority opinion seems to stand for the proposition that it is not an abuse of discretion for the court to find dependency as to one parent based upon acts committed by the other in the absence of the parent and without

16. *Id.* at 981.

17. *Id.*

18. *Id.*

19. *Id.* at 982 (citing *D.H. v. Dep't of Children & Families*, 769 So. 2d 424, 426 (Fla. 4th Dist. Ct. App. 2000)).

20. *D. Children*, 820 So. 2d at 982.

21. 737 So. 2d 1227 (Fla. 2d Dist. Ct. App. 1999).

22. *Id.* at 1228.

23. *D. Children*, 820 So. 2d at 984 (Warner, J., dissenting).

24. *Id.* at 983.

25. *Id.*

26. *D. Children v. Department of Children & Family Services* 820 So. 2d 980, 984 (Fla. 4th Dist. Ct. App. 2002).

27. *Id.*

28. *Id.* at 984-85 (Warner, J., dissenting).

any showing of evidence that the other parent had any involvement in the behavior which gave rise to the abuse or neglect.²⁹

The second issue in *D. Children* dealt with the ongoing question of whether a child may be found dependent based upon abuse or neglect afflicted upon a sibling, which is also discussed in the section of this article on termination of parental rights.³⁰ Relying upon *In re M.F.*³¹ and *D.H. v. Department of Children & Families*,³² the majority recognized that the trial court cannot rely solely on the existence of one child's injury in finding two other children dependent.³³ Moreover, the majority decided it would "defer to the trial judge, who heard and observed the witnesses, and resolved the conflicts and doubts in favor of protecting all three of the children, not just the one who was abused."³⁴ In so doing, it relied upon a social worker who testified at the trial level about the lack of explanation for the injury and the inability to assess the parties' needs to be assessed to ensure the safety of the children.³⁵ Again, on this ground, Judge Warner dissented.³⁶ She explained that the social worker never interviewed the children, nor the parents, but found the same risk for the boys as for the infant girl.³⁷ Relying upon the precedents supporting the proposition that there has to be some kind of independent evidence apart from the single act to allow for a finding of dependency as to two other children, Judge Warner held that "[w]here there is no evidence to support the trial court's ruling, or where the facts as found by the trial court do not as a matter of law support the relief granted, no deference should be given."³⁸

The issue of prospective neglect regularly comes before the Florida appellate courts in both dependency and termination of parental rights cases. As demonstrated by the *D. Children* case, it usually arises in the context of prior abuse or neglect of siblings forming the basis of an allegation of "prospective abuse" against the child who is the subject of the present proceeding.³⁹ It can also arise in the context where no child has yet been abused or

29. See *id.* at 981, 982.

30. *Id.* at 982.

31. 770 So. 2d 1189 (Fla. 2000).

32. 769 So. 2d 424 (Fla. 4th Dist. Ct. App. 2000).

33. *D. Children*, 820 So. 2d at 982.

34. *Id.*

35. *Id.*

36. *Id.* at 985 (Warner, J., dissenting).

37. *Id.*

38. *D. Children v. Department of Children & Family Services* 820 So. 2d 980, 986 (Fla. 4th Dist. Ct. App. 2002). (Warner, J., dissenting).

39. See Dale, *supra* note 9, at 913; Michael J. Dale, *Juvenile Law in Florida in 1998*, 23 NOVA L. REV. 819, 821–22, 825 (1999).

neglected but where the parents' behavior suggests prospective neglect.⁴⁰ The standard for such termination cases originated in the Supreme Court of Florida case, *Padgett v. Department of Health & Rehabilitative Services*,⁴¹ decided in 1991. In *In re P.S.*,⁴² the question was whether the "court abused its discretion in admitting evidence of the father's prior DUI arrest" in determining whether there was dependency.⁴³ The arrest had occurred six years before the proceedings and long before the child was born.⁴⁴ The appellate court held that such information was not relevant.⁴⁵ Applying the prospective neglect standard, and citing *Palmer v. Department of Health & Rehabilitative Services*,⁴⁶ the court held that under the standard provided by section 39.01(14)(f) of the *Florida Statutes*, involving substantial risk of imminent abuse, abandonment, or neglect, the "court abused its discretion in finding that the father's single act 'clearly and certainly' predicted future neglect."⁴⁷

As reported in this Journal, a trial court can find a child dependent, who was not being abused, based upon abuse inflicted on a sibling where a "nexus" exists between the "act of abuse and prospective abuse."⁴⁸ This was the conclusion of the court in *O.S. v. Department of Children & Families*,⁴⁹ where a severe beating by the mother, intended as corporal punishment, was likely to be employed on the younger child even though the child had not been paddled as often as the older sibling.⁵⁰ In light of the fact that the older child was no longer in the home, the appellate court upheld the concept that the younger child might "receive the brunt of the mother's rage" and for that reason affirmed the dependency finding as to the younger child.⁵¹ Another dependency case predicated on proof of neglect or abuse of other children is *M.N. v. Department of Children & Families*.⁵² The question in *M.N.* was whether an incident of prior neglect or abuse of one child would be sufficient

40. See *L.B. v. Dep't of Children & Families*, 835 So. 2d 1189 (Fla. 1st Dist. Ct. App. 2002); *Hroncich v. Dep't of Health & Rehab. Servs.*, 667 So. 2d 804 (Fla. 5th Dist. Ct. App. 1995); *Palmer v. Dep't of Health & Rehab. Servs.*, 547 So. 2d 981 (Fla. 5th Dist. Ct. App. 1989).

41. 577 So. 2d 565, 571 (Fla. 1991).

42. 825 So. 2d 530 (Fla. 2d Dist. Ct. App. 2002).

43. *Id.*

44. *Id.*

45. *Id.*

46. 547 So. 2d 981, 984 (Fla. 5th Dist. Ct. App. 1989).

47. *P.S.*, 825 So. 2d at 531.

48. See *D.H. v. Dep't of Children & Families*, 769 So. 2d 424, 427 (Fla. 4th Dist. Ct. App. 2000).

49. 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).

50. *Id.* at 1149.

51. *Id.*

52. 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).

by itself to establish “a substantial risk of imminent abuse” of another child, as required by Chapter 39.⁵³ Relying upon a body of Fifth District Court of Appeal cases, in *M.N.*, the court held that independent evidence must be introduced establishing a nexus between the prior abuse or neglect and the allegation of prospective abuse.⁵⁴ An example of a nexus may be a “mental or emotional condition of [a] parent which will continue, such as mental illness [or] drug addiction.”⁵⁵ In the *M.N.* case, the parent did not suffer from a mental illness but had a below average intellectual ability that resulted in an adjustment disorder that was neither serious nor disturbing.⁵⁶ For that reason, the appellate court held that the Department of Children and Families (“DCF”) failed to meet its burden of establishing the sufficient nexus between the prior abuse of one child and the prospective abuse or neglect of the other child.⁵⁷

In a series of opinions commencing with *Beagle v. Beagle*,⁵⁸ the Supreme Court of Florida has rejected grandparent intervention in family affairs by means of claims of right to visitation.⁵⁹ Grandparent visitation rights arose in a different context in *C.S. v. Biddle*,⁶⁰ where grandparents initiated the dependency proceeding and sought custody of the children.⁶¹ The court ordered the mother to make the three children available to the grandparents, in order to permit the grandparents to evaluate the children’s medical, dental and educational circumstances.⁶² Furthermore, the court ordered the parents to deliver the children to the grandparents for overnight visitation and authorized the grandparents to obtain evaluations of the children, all absent a finding that the children were dependent.⁶³ On a petition for writ of prohibition, the appellate court granted the writ and quashed the service.⁶⁴ Citing to the

53. *Id.* at 447 (citing § 39.01(14)(f)).

54. *Id.* at 448 (citing *K.C. v. Dep’t of Children & Families*, 800 So. 2d 676 (Fla. 5th Dist. Ct. App. 2001); *Gaines v. Dep’t of Children & Families*, 711 So. 2d 190, 194 (Fla. 5th Dist. Ct. App. 1998); *O.S.*, 821 So. 2d at 1145; *D.H. v. Dep’t of Children & Families*, 769 So. 2d 424 (Fla. 4th Dist. Ct. App. 2000)).

55. *Id.*

56. *Id.*

57. *Id.* at 449.

58. 678 So. 2d 1271 (Fla. 1996).

59. See Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 98–99 (2000); see also *Troxel v. Granville*, 530 U.S. 57 (2000); *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000); *Von Eiff v. Azicn*, 720 So. 2d 510 (Fla. 1998); *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d Dist. Ct. App. 1999).

60. 829 So. 2d 1004 (Fla. 2d Dist. Ct. App. 2002).

61. *Id.*

62. *Id.* at 1005.

63. *Id.*

64. *Id.*

fundamental rights of parents to raise their children absent a compelling state interest, as articulated in the *Beagle* case,⁶⁵ the appellate court held that “[w]hen individuals enlist the judicial system to intervene in a parent/child relationship, the court must scrupulously adhere to the pertinent statutes in determining whether such interference is warranted.”⁶⁶ The court concluded that the “status as grandparents does not confer on them any special rights to direct the upbringing of these children or to visit with the children without parents’ permission.”⁶⁷

The failure of parents to appear both at dependency hearings and in termination of parental rights cases can result in a default judgment. Important issues of proper notice and adequate due process protections arise in these cases. Over a dissent, the Third District Court of Appeals, in *L.W. v. Florida Department of Children & Family Services*,⁶⁸ upheld a default order of dependency as to a father who failed to appear at an arraignment hearing where the father’s attorney was notified of the hearing and left two recorded messages for the father.⁶⁹ The dissent argued that less than twenty-four hours notice of the arraignment hearing on the dependency proceeding to the lawyer, while sufficient as a general proposition under Florida law,⁷⁰ was insufficient because fundamental rights were at stake and a mere twenty-four hours notice was inadequate particularly given the lack of assurance that the father had actually received the notice.⁷¹

In another failure to notify case, *S.H. v. Department of Children & Families*,⁷² the mother, but not the father, was served at home with a summons in a dependency proceeding.⁷³ He was at the courthouse on the morning of the arraignment, “signed an attendance sheet outside of the courtroom . . . [but] left the courthouse before the arraignment began.”⁷⁴ The trial court ruled that he had been properly served by substituted service and entered a default judgment finding the child dependent.⁷⁵ Noting that it was sympa-

65. *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996).

66. *C.S.*, 829 So. 2d at 1005.

67. *Id.*; see also *Miller v. California*, 355 F.3d 1172, 1175 (9th Cir. 2004) (discussing grandparents’ lack of liberty interest in making decisions about care, custody, and control of their grandchildren).

68. 829 So. 2d 938 (Fla. 3d Dist. Ct. App. 2002).

69. *Id.* at 939.

70. See *M.E. v. Fla. Dep’t of Children & Family Servs.*, 728 So. 2d 367, 368 (Fla. 3d Dist. Ct. App. 1999).

71. *L.W.*, 829 So. 2d at 940.

72. 837 So. 2d 1117 (Fla. 4th Dist. Ct. App. 2003).

73. *Id.*

74. *Id.*

75. *Id.*

thetic to the “considered ruling of the trial judge,”⁷⁶ the court reversed based upon the language of Chapter 39 regarding service of process.⁷⁷ The court found that the father’s signing of the attendance sheet did not constitute appearance in a hearing before the court as required by Florida law.⁷⁸ Furthermore, there was no substituted service on the father “because the mother’s residence was not [the father’s] ‘usual place of abode’ at the time of service.”⁷⁹ Finally, the father’s knowledge of the dependency proceeding is not enough to waive the statutory service requirement.⁸⁰ In addition, this was not a case of deliberate refusal to accept delivery of service.⁸¹ Thus, “[t]he order of disposition with respect to the father [was] reversed.”⁸²

In the third case involving default at the dependency hearing stage, *A.J. v. Department of Children & Families Services*,⁸³ parents, who had attended two days of trial and many hearings in their dependency case suffered a default judgment and consent order against them when they were twenty-five minutes late for the commencement of the third day of trial in Miami.⁸⁴ The Fourth District Court of Appeal reversed the lower court’s order on grounds that the trial court abused its discretion in denying the parents’ motion to set aside the default judgment.⁸⁵ The appellate court recognized that the purpose behind the statutory authority enabling the court to enter a default order at this stage is to avoid the parents defeating the object of the dependency proceeding through neglect and further that the court has the authority to bring the case to a conclusion even if the parents do not participate.⁸⁶ However, the appeals court noted, nonetheless, that “[t]he purpose of the statute is not to inject ‘gotcha’ practices into the dependency process.”⁸⁷ Under the facts of the case, the lower court abused its discretion in deciding the case by way of a default rather than the merits.⁸⁸

There are times when at the end of the dependency proceeding the remaining issue is one of custody. In *L.F. v. Department of Children & Family*

76. *Id.* at 1118.

77. *S.H.*, 837 So. 2d at 1118.

78. *Id.*; see § 39.502(2).

79. *S.H.*, 837 So. 2d at 1118.

80. *Id.* (citing *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225–27 (Fla. 1984) (finding that actual notice does not render attempted service valid)).

81. *S.H. v. Dep’t of Children & Families*, 837 So. 2d 1117, 1119 (Fla. 4th Dist. Ct. App. 2003).

82. *Id.* at 1120.

83. 845 So. 2d 973 (Fla. 4th Dist. Ct. App. 2003).

84. *Id.* at 974.

85. *Id.* at 976.

86. *Id.*

87. *Id.*

88. *A.J.*, 845 So. 2d at 976.

Services,⁸⁹ two half siblings resided with their natural father/step-father in Georgia during the course of a dependency proceeding against the mother.⁹⁰ At the end of the proceeding, the court, having previously found dependency, ordered both reunification and strengthening/maintaining the current placement, placing custody of both children with the natural father of one who was also the step-father of the other.⁹¹ The Fourth District Court of Appeal reversed because, while under the dependency statute the court was within its discretion to use the best interest standard to determine which parent should have custody of the dependant child, the step-father was neither a parent nor a relative under the Florida statute to whom custody might go.⁹² Thus, the court remanded to consider how the parties might resolve long-term custody and whether a new case plan might be appropriate.⁹³

S.C. v. Guardian Ad Litem,⁹⁴ involved an important issue of a juvenile's right to privacy in the context of a dependency proceeding. S.C., a child of fourteen, was the subject of a dependency proceeding and had a guardian *ad litem* appointed on her behalf.⁹⁵ In the course of the proceeding against the mother, the child sought to maintain the privacy of information contained in her records held by a former therapist and psychologist.⁹⁶ In an effort to avoid release of the information to her guardian *ad litem*, the child "moved to enjoin the guardian *ad litem* program, and any individual guardian *ad litem* assigned, from obtaining any confidential or privileged records" in the absence of the formal petition or hearing as provided under Florida law.⁹⁷ Consequently, because the doctor was going to be called at the adjudicatory hearing, the child sought to enjoin anyone from calling the doctor.⁹⁸

On a writ of certiorari, the Fourth District Court of Appeal concluded that the order denying the child's motion violated Florida law by failing to allow the child, fourteen years of age, an opportunity to be heard.⁹⁹ It did not rule on the issue of maturity or competency of the minor to seek the relief.¹⁰⁰ The court concluded that the child had a right to assert the therapist-patient

89. 837 So. 2d 1098 (Fla. 4th Dist. Ct. App. 2003).

90. *Id.* at 1099.

91. *Id.* at 1101.

92. *Id.* at 1102 (citing FLA. STAT. § 39.01(49), (60) (2002)).

93. *Id.* at 1104.

94. 845 So. 2d 953 (Fla. 4th Dist. Ct. App. 2003).

95. *Id.* at 955.

96. *Id.* at 955-56.

97. *Id.* at 956.

98. *Id.*

99. S.C., 845 So. 2d at 956.

100. *Id.*

privilege, and that nothing contained in Chapter 39¹⁰¹ provided the guardian *ad litem* with the right to review the privileged records of the dependent child.¹⁰² The power of the guardian *ad litem* found in Section 61.403(2) does not authorize the guardian *ad litem* to obtain confidential psychotherapist-patient records absent the child's right to notice and an opportunity to be heard to challenge such access.¹⁰³ The court recognized the child's right of privacy under the Florida Constitution and case law.¹⁰⁴ Moreover, the court concluded that the child had the right to notice and the opportunity to be heard, that the matter should be resolved *in camera* giving the child the opportunity to be heard, and that such was the least restrictive and intrusive means of determining whether the material should be made available.¹⁰⁵ Finally, the court relied upon case law from California,¹⁰⁶ and a body of professional literature to support the proposition that mature minors have privacy interests that ought to be recognized in medical decision-making contexts.¹⁰⁷ It is also significant that the child in this case had a lawyer from a legal aid program representing her. Under Florida law, the child has no right to counsel in a dependency proceeding but is only entitled to representation by the guardian *ad litem* with whom she was at odds in this case.¹⁰⁸

Jurisdiction of the dependency court over a family that had no ties to the state of Florida and was merely in transit when the children were seized at Miami International Airport was before the Third District Court of Appeal in *K.H. v. Department of Children & Family Services*.¹⁰⁹ The case involved a father from Trinidad who was living with his wife, an employee of the U.S. State Department posted in Brazil, but who was not the mother of his children.¹¹⁰ The father, according to the appellate court, disciplined his daughter by striking her on the buttocks repeatedly with a wooden stick, leaving bruises and abrasions.¹¹¹ The discipline took place on U.S. Embassy property in Brazil.¹¹² Believing that the family might abscond to Trinidad, the

101. See FLA. STAT. § 39.4085(21) (2003).

102. *Id.*

103. § 61.403(2).

104. S.C., 845 So. 2d at 958 (citing FLA. CONST. art. I, § 23; *In re T.W.*, 551 So. 2d 1186 (Fla. 1989)).

105. S.C. v. Guardian Ad Litem, 845 So. 2d 953, 959 (Fla. 4th Dist. Ct. App. 2003).

106. *Id.* (citing *In re Kristine W.*, 114 Cal. Rptr. 2d 369 (Ct. App. 2001)).

107. *Id.* (citing *Kristine W.*, 114 Cal. Rptr. 2d at 373-74).

108. See generally Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001).

109. 846 So. 2d 544, 545-46 (Fla. 3d Dist. Ct. App. 2003).

110. *Id.* at 546.

111. *Id.*

112. *Id.*

State Department detained them and the children were taken into the DCF custody when their plane arrived at Miami International Airport.¹¹³ Despite its statement that “[w]e agree with the father that their case raises serious concerns over jurisdiction, as the family had no ties to the State of Florida,”¹¹⁴ the court held that under section 39.40(2) of the *Florida Statutes*, it has original jurisdiction when a child is taken into custody by the DCF.¹¹⁵ The court also found that under the Uniform Child Custody Jurisdiction Act applicable in Florida pursuant to section 61.503(4) of the *Florida Statutes*, the dependency court had emergency jurisdiction over a child who was present in the State of Florida.¹¹⁶ In addition, it noted that no proceedings were brought in Virginia.¹¹⁷ It upheld the jurisdiction despite the fact that it recognized that jurisdiction was created by acts of the U.S. State Department and Florida officials.¹¹⁸

And finally, in a statement that is becoming redundant in appellate decisions, the court concluded its opinion by stating that “[t]his case presents yet another unfortunate failure of the Department of Children and Families and the court system to fulfill their statutory duties to the children and the family.”¹¹⁹

For well over a decade the appellate courts and this author have commented on the failure of the dependency trial court to state the facts upon which findings of dependency are made.¹²⁰ In *M.S. v. Department of Children & Families*,¹²¹ the court was faced with the same problem and, once again, it reversed and remanded because the trial court failed to adequately state facts upon which the conclusion of abuse was made, or to state any facts to support the conclusions that the relationship between the mother and her child was unhealthy but simply tracked the factual allegations of the amended petition for dependency.¹²²

113. *Id.*

114. *K.H.*, 846 So. 2d at 546.

115. *Id.* at 547.

116. *Id.*

117. *Id.*

118. *Id.*

119. *K.H.*, 846 So. 2d at 547.

120. See *In re T.S.*, 557 So. 2d 676, 677 (Fla. 2d Dist. Ct. App. 1990); *Williams v. Dep't of Health & Rehab. Servs.*, 568 So. 2d 995, 997 (Fla. 5th Dist. Ct. App. 1990); see also *J.C.G. v. Dep't of Children & Families*, 780 So. 2d 965 (Fla. 5th Dist. Ct. App. 2001); Michael J. Dale, *Juvenile Law Color: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 140 (1994).

121. 827 So. 2d 1089 (Fla. 1st Dist. Ct. App. 2002).

122. *Id.* at 1090.

III. TERMINATION OF PARENTAL RIGHTS

A. Adjudicatory Issues

Florida Rules of Judicial Administration provide that the parties must consent for testimony to take place through the use of communication equipment rather than in court.¹²³ In *A.B. v. Department of Children & Family Services*,¹²⁴ the appeals court reversed in a case where the trial court took testimony of a treating psychiatrist as well as a former foster parent of the child via telephone over objections by the mother's counsel.¹²⁵ The court held that given the seriousness of the witnesses' testimony and the nature of the issue in the case the use of telephone testimony without the mother's consent violated the mother's due process rights.¹²⁶

Florida law provides that in a termination of parental rights case one of the grounds for termination is the setting where a case plan has been filed, a child has been previously adjudicated dependent and the child continues to be abused, neglected and abandoned by the parents.¹²⁷ That issue is clear on its face. However, in *In re T.B.*,¹²⁸ the intermediate appellate court reversed because the child was never declared dependent, the father "had no tasks to complete under the case plan he was given, there was no factual basis to find that he failed to substantially comply with the [case] plan."¹²⁹

The issue of whether the failure of parents to appear at termination proceedings may constitute grounds for default termination of parental rights has been before the appellate courts on a number of occasions.¹³⁰ As it has in the dependency context,¹³¹ in *C.R.K. v. Department of Children & Families*,¹³² the trial court defaulted a mother at a calendar call for failure to appear after having been given notice.¹³³ "The mother's attorney was present,

123. FLA. R. JUD. ADMIN. 2.071(d).

124. 820 So. 2d 1085 (Fla. 3d Dist. Ct. App. 2002).

125. *Id.* at 1086.

126. *Id.*

127. § 39.806(1)(e).

128. 819 So. 2d 270 (Fla. 2d Dist. Ct. App. 2002).

129. *Id.* at 272.

130. Michael J. Dale, *Juvenile Law: 1998 Survey of Florida Law*, 24 NOVA L. REV. 179 (1999).

131. *See infra* Part II.

132. 826 So. 2d 1053 (Fla. 4th Dist. Ct. App. 2002).

133. *Id.* at 1054. The notice provision provided "Termination of failure to personally appear at the advisory hearing constitutes consent to termination of parental rights of the child(ren). If you fail to personally appear on the date and time specified, you may lose all legal rights as a parent to the child(ren)." *Id.*

but the mother was not.”¹³⁴ Nonetheless, the trial court went forward and took testimony on the second part of the Florida test for termination of parental rights—manifest best interest of the children.¹³⁵ The appellate court reversed finding that the trial court had entered a default at the calendar call.¹³⁶ The appellate court held that the “calendar call is not an adjudicatory hearing” which is the event where failure to appear can produce a default.¹³⁷ For that reason, the appellate court held that the notice was inadequate.¹³⁸ Section 39.801(3)(v) of the *Florida Statutes* refers specifically to the failure of a parent to appear at the adjudicatory hearing.¹³⁹ The court therefore reversed.¹⁴⁰ As a matter of fundamental due process, a parent in a termination of parental rights case is entitled to notice by service of the petition, pleadings, and other papers.¹⁴¹

In *M.J.W. v. Department of Children & Families*,¹⁴² the question was whether the trial court could hold an adjudicatory hearing where the mother was never served in compliance with the *Florida Rules of Juvenile Procedure* and the statute.¹⁴³ Under the facts of the case, the mother learned of the hearing through telephone conversations but was never served in compliance with the statute by officials from DeKalb County, Georgia, where she lived.¹⁴⁴ The appellate court reversed the adjudication of termination of parental rights finding that the statute and the rule provide for the sole manner to effectuate service in a parental termination proceeding—either personal service or constructive service.¹⁴⁵ Neither happened here, and thus, the court reversed.¹⁴⁶

A second case involving termination of parental rights and the question of proper service upon a parent who fails to appear is *J.M. v. Department of Children & Families*.¹⁴⁷ In *J.M.*, when the DCF filed its petition to terminate parental rights to appellant’s three children, the DCF could not serve the individual personally so it sought service through publication as required by

134. *Id.*

135. *Id.*

136. *C.R.K.*, 826 So. 2d at 1055.

137. *Id.*

138. *Id.*

139. § 39.801(3)(v).

140. *See also In re C.R.*, 806 So. 2d 646 (Fla. 3d Dist. Ct. App. 2002).

141. *See generally* § 89.801(1).

142. 825 So. 2d 1038 (Fla. 1st Dist. Ct. App. 2002).

143. *Id.* at 1039.

144. *Id.* at 1039–40.

145. *Id.* at 1040–41.

146. *Id.*

147. 833 So. 2d 279 (Fla. 5th Dist. Ct. App. 2002).

Florida law.¹⁴⁸ The problem the DCF faced was that when it published notice of the termination of parental rights, it did so less than twenty-eight days before the advisory hearing.¹⁴⁹ Florida statute requires that written defenses be filed with the Clerk not later than the date set in the notice, which shall not be less than twenty-eight nor more than sixty days after the first publication of the notice.¹⁵⁰ The fact that the parent had a lawyer is not dispositive of the issue, according to the appellate court, because that makes it clear that the issue was the initial notification, not the presence of counsel.¹⁵¹ Subsequent notification can be served upon the lawyer and such notification will be appropriate, as the court held in *M.E. v. Florida Department of Children & Family Services*.¹⁵² Because fundamental rights are at issue, strict adherence to notice requirements is required and for that reason the court reversed and remanded.¹⁵³ It is also significant that the court cited *Santosky v. Kramer*,¹⁵⁴ which speaks to the significant interests on a constitutional basis of parents in termination cases.¹⁵⁵

Section 39.806(1)(i) allows for termination of parental rights to one child where parental rights have previously been terminated involuntarily to a sibling.¹⁵⁶ Two appellate courts recently dealt with the related issue of recognizing a termination of parental rights order from another state in an ongoing proceeding within Florida.¹⁵⁷ In *Department of Children & Families v. V.V.*,¹⁵⁸ a mother in a Florida termination case had her rights terminated as to a different child in Mississippi under circumstances where she was not afforded counsel.¹⁵⁹ Nonetheless, the court in *V.V.* held that “[p]rinciples of comity and of full faith and credit demand that the judgment be recognized. No paramount rule of public policy dictates otherwise.”¹⁶⁰ In *J.H.K.*, the appellate court reversed the dismissal of a termination case and remanded for new hearing so that the DCF could offer evidence surrounding a New Mexico termination, according to the court, based upon the presumption arising

148. *Id.* at 280 (citing § 49.09).

149. *Id.* at 281.

150. § 49.011(13).

151. *J.M.*, 833 So. 2d at 282.

152. 728 So. 2d 367, 368 (Fla. 3d Dist. Ct. App. 1999).

153. *J.M.*, 833 So. 2d at 282–83.

154. 455 U.S. 745 (1982).

155. *Id.*

156. § 39.806(1)(i).

157. *Dep’t of Children & Families v. J.H.K.*, 834 So. 2d 298 (Fla. 5th Dist. Ct. App. 2002); *Dep’t of Children & Families v. V.V.*, 822 So. 2d 555 (Fla. 5th Dist. Ct. App. 2002).

158. 822 So. 2d at 555–56.

159. *Id.* at 558.

160. *Id.*

from the prior termination.¹⁶¹ The court's analysis is troubling, in addition to being so simplistic and lacking in analysis.

Significantly, the United States Supreme Court in *Lassiter v. Department of Social Services*¹⁶² recognized the importance of the protected liberty interest to parents, even though it held there was no absolute right to counsel in a termination of parental rights case.¹⁶³ Not looking behind the termination decree in the other jurisdiction raises basic constitutional questions. Indeed, the United States Supreme Court has recognized the concept of a collateral attack upon judgments of other jurisdictions if they lack fairness.¹⁶⁴ The seminal United States Supreme Court case, *Williams v. North Carolina*,¹⁶⁵ demonstrates this proposition in the context of recognition of foreign divorce decrees.

The issue of the appointment of a guardian *ad litem* continues before the appellate courts in Florida. In *G.S. v. Department of Children & Family Services*,¹⁶⁶ the appellate court reversed the trial court in a termination of parental rights case for failure to appoint a guardian *ad litem* to represent the interests of the minor child.¹⁶⁷ With little discussion, the appellate court cited Florida law that requires a trial court to appoint a guardian *ad litem* to represent the best interests of a child in any termination of parental rights proceeding if a guardian *ad litem* had not been previously appointed.¹⁶⁸ Despite the fact that the court in *G.S.* described the failure to appoint a guardian as a clear violation of the statutory mandate, and the fact that the federal funding statute, the Childhood Abuse Prevention and Treatment Act of 1974 ("CAPTA")¹⁶⁹ requires the appointment of a guardian *ad litem* in a dependency proceeding, there is Florida case law that inexplicably accepts the failure to either appoint or continue the appointment of a guardian *ad litem* in dependency and termination cases.¹⁷⁰

161. *J.H.K.*, 834 So. 2d at 299.

162. 452 U.S. 18 (1981); *see also* *Santosky v. Kramer*, 455 U.S. 745 (1982).

163. *Lassiter*, 452 U.S. at 32–33.

164. *See id.* at 33–34.

165. 325 U.S. 226 (1945).

166. 838 So. 2d 1221 (Fla. 3d Dist. Ct. App. 2003).

167. *Id.* at 1222.

168. *Id.* (citing § 39.808(2); FLA. R. JUV. P. 8.510(A)(2)(c)).

169. 42 U.S.C. §§ 5101–19 (2000).

170. For a discussion of this issue see Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 797 (2001).

B. Appellate Issues

The Supreme Court of Florida has decided the issue of whether the procedures set forth in *Anders v. California*,¹⁷¹ in which the United States Supreme Court enunciated the method by which counsel for an indigent defendant in a criminal case could withdraw from the appeal on grounds that there is no valid basis to appeal, applies to a termination of parental rights case. In *Anders* the United States Supreme Court ruled that when an attorney for an indigent defendant believes the case on appeal to be wholly frivolous, the lawyer may seek permission to withdraw after conscientious examination of the record. However, the attorney must submit a brief referring to anything in the record that the lawyer believes might reasonably support the appeal.¹⁷² Since 1971, Florida has applied the *Anders* procedure to criminal appeals in this state.¹⁷³ In *N.S.H. v. Florida Department of Children & Family Services*,¹⁷⁴ the Supreme Court of Florida held that *Anders* did not apply to termination of parental rights cases.¹⁷⁵ It did so, despite the fact that it had earlier expanded the *Anders* procedures to appeals of involuntary civil commitment to mental health facilities, where a person's physical liberty was at issue.¹⁷⁶ The court in *N.S.H.* held that the *Anders* procedures were not necessary in a termination of parental rights case because the risks at stake were not the same.¹⁷⁷ The court held that there was no loss of liberty in the termination of parental rights setting.¹⁷⁸ The court also noted that the interests at stake were not just of the parents but also those of the child.¹⁷⁹ The court believed that because termination cases, apparently unlike criminal cases, involved extensive fact-patterns, the burden placed on the appellate court in reviewing extensive records would be a substantial burden. Finally, the court applied the three-part test of *Matthews v. Eldridge*¹⁸⁰ to conclude that there was no due process violation in the failure to require the *Anders* process to be employed in termination of parental rights proceeding.¹⁸¹ The court did, however, set up a procedure for withdrawal by appellate counsel. It relied

171. 386 U.S. 738 (1967).

172. *Id.* at 744.

173. *State v. Wooden*, 246 So. 2d 755, 757–58 (Fla. 1971), *abrogated on other grounds by State v. First Dist. Ct. of App.*, 569 So. 2d 439, 442 (Fla. 1990).

174. 843 So. 2d 898 (Fla. 2003).

175. *Id.* at 900.

176. *Pullen v. State*, 802 So. 2d 1113, 1120 (Fla. 2001).

177. *N.S.H.*, 843 So. 2d at 902.

178. *Id.*

179. *Id.*

180. 424 U.S. 319 (1976).

181. *N.S.H.*, 843 So. 2d at 903.

upon the Fourth District Court of Appeal's opinion in *Ostrum v. Department of Health & Rehabilitative Services*,¹⁸² which held that the attorney should file a motion seeking leave to withdraw, along with a certification.¹⁸³

[W]here appellate counsel seeks leave to withdraw from representation of an indigent parent in a termination of parental rights case, the motion to withdraw shall be served on the client and contain a certification that after a conscientious review of the record the attorney has determined in good faith that there are no meritorious grounds on which to base an appeal. The parent shall then be provided the opportunity to file a brief on his or her own behalf.¹⁸⁴

IV. PROSPECTIVE ABUSE AND NEGLECT

Prospective abuse and/or neglect occurs in both dependency proceedings and termination of parental rights ("TPR") cases.¹⁸⁵ This is an important topic that has been the subject of a number of appellate cases in both settings this year, and for this reason it is addressed separately in this survey. "The issue in prospective neglect or abuse cases is whether future behavior, which will adversely affect the child, can be clearly and certainly predicted."¹⁸⁶ The genesis for predicting a parent's future behavior can be the prior abuse or neglect of a sibling.¹⁸⁷ It can also be a finding of "substantial risk of imminent abuse . . . or neglect,"¹⁸⁸ usually stemming from a showing in the record that the parent's behavior "was beyond the parent's control, likely to continue, and placed the child at risk,"¹⁸⁹ but where there was no prior finding of abuse or neglect of another child. The most often cited behavioral conditions in the latter setting include mental illness, drug addiction, or pedophilia.¹⁹⁰

182. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).

183. *Id.* at 1361.

184. *N.S.H.*, 843 So. 2d at 904.

185. *Denson v. Dep't of Health & Rehab. Servs.*, 661 So. 2d 934, 936 (Fla. 5th Dist. Ct. App. 1995).

186. *Palmer v. Dep't of Health & Rehab. Servs.*, 547 So. 2d 981, 984 (Fla. 5th Dist. Ct. App. 1989).

187. *M.N. v. Dep't of Children & Families*, 826 So. 2d 445, 447 (Fla. 5th Dist. Ct. App. 2002).

188. *Id.*

189. *Gaines v. Dep't of Children & Families*, 711 So. 2d 190, 193 (Fla. 5th Dist. Ct. App. 1998).

190. *Id.* Addressing conflict between circuits regarding whether a dependency ruling could be based entirely upon the commission of a single sex act on a different child, the Supreme Court of Florida held in *In re M.F.* that courts should focus on a totality of circumstances in each case and not rely upon only "one particular fact." 770 So. 2d 1189, 1193 (Fla. 2000). In *M.F.*, the father who had committed the sex act on his child had been incarcerated for the

The Supreme Court of Florida initially addressed prospective abuse or neglect in *Padgett v. Department of Health & Rehabilitative Services*¹⁹¹ in 1991. The court held that permanent termination of rights in one child because of abuse or neglect could be sufficient grounds to terminate parental rights to a different child.¹⁹² However, because fundamental liberty interests are at stake in a TPR case, the Supreme Court of Florida held that “the state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child.”¹⁹³ Further, the state must show that termination is the least restrictive means of protecting the child from harm by the parent.¹⁹⁴

There is continuing appellate conflict over the appropriate application of the prospective abuse and neglect doctrine, particularly in termination cases. In *A.B. v. Department of Children & Families*, the mother appealed an order terminating her parental rights claiming that termination, under section 39.806(1)(i) of the *Florida Statutes*, was unconstitutional because the statute allowed termination “without regard for extraneous circumstances, depriv[ing] parents of the fundamental liberty interests they have in determining the care and upbringing of their children.”¹⁹⁵ The court stated that “implicit in the recognition of neglect or abuse of other children as a ground for termination of parental rights to a different child is the absence of any factor that would evince a break in the chain of demonstrated parental failure.”¹⁹⁶ In effect, this created a rebuttable presumption of prospective neglect or abuse whenever there had been a prior termination under conditions of abuse or neglect, shifting the burden to the parent to prove that past conduct, condition, or circumstances could not serve as a “predictor” of future behavior.¹⁹⁷ This appears to be at odds with *Padgett*’s mandate that the State

crime. *Id.* at 1194. DCF sought a dependency determination based upon this act rather than upon the totality of the circumstances, which included the fact that the father would be incarcerated for a “substantial portion of the children’s years of minority.” *Id.* The Supreme Court of Florida approved the lower court’s result, but disapproved the remainder of the lower court’s opinion for failure to apply the totality of the circumstances test. *Id.* at 1194–95.

191. 577 So. 2d 565 (Fla. 1991).

192. *Id.* at 571.

193. *Id.*; see also *Santosky v. Kramer*, 455 U.S. 745 (1982).

194. *Padgett*, 577 So. 2d at 571. The evidentiary standard required in a dependency proceeding is a preponderance of the evidence. *M.N. v. Dep’t of Children & Families*, 826 So. 2d 445, 447 (Fla. 5th Dist. Ct. App. 2002).

195. 816 So. 2d 684, 685 (Fla. 5th Dist. Ct. App. 2002). In *A.B.*, the mother appealed a termination based upon a prior termination of her rights in a different child at the age of one month because of the child’s medical problems. *Id.* at 684.

196. *Id.* at 686.

197. *Id.*

clearly and convincingly show imminent harm to the child,¹⁹⁸ and is in direct conflict with the Fourth District's subsequent decision in *F.L. v. Department of Children & Families*.¹⁹⁹

Several months later, in his concurrence and dissent to *C.W. v. Department of Children & Families*,²⁰⁰ a First District case, Judge Ervin expressed doubt over whether the Legislature can "trump" a parent's liberty interest in raising children by allowing a termination proceeding based solely upon that parent's past egregious conduct to another child without requiring some "proof of a causal connection between the prior conduct and the parent's current conduct with the child sought to be committed."²⁰¹ Then, in *Department of Children & Families v. B.B.*,²⁰² a Fifth District case involving termination of parental rights to seven children based upon the sexual abuse of an eighth child, the court addressed the "current uncertainty in the law," acknowledging potential constitutional issues and a need for the least restrictive means of protecting a child.²⁰³ This uncertainty became manifest in *F.L. v. Department of Children & Families*.²⁰⁴ The Fourth District reversed a termination that had been based solely upon involuntary termination of rights to a prior child.²⁰⁵ The court held that termination under section 39.806(1)(i) "unconstitutionally shifted the burden to the parent to prove that reunification would not be harmful to the child,"²⁰⁶ stating that the "DCF carries the

198. *Padgett*, 577 So. 2d at 571.

199. 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003).

200. 814 So. 2d 488, 493 (Fla. 1st Dist. Ct. App. 2002).

201. *Id.* at 496. In *C.W.*, the mother's rights to her child were terminated because she had lost her rights to three of the child's siblings involuntarily and had surrendered her rights to a fourth child. *Id.* at 491. The court found that she had not remedied the situations leading to these prior terminations and affirmed the termination of her rights to the fifth child. *Id.*

202. 824 So. 2d 1000 (Fla. 5th Dist. Ct. App. 2002). In *B.B.*, the father, a polygamist, "married" his natural daughter, consummating the marriage when she was twelve years old. *Id.* at 1002.

203. *Id.* at 1007-08. The court stated that there may be constitutional implications in a termination proceeding because a parent has a "constitutionally protected liberty interest in the care, custody, and management of his or her child." *Id.* at 1008.

204. 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003). The mother appealed a termination of her rights in her seventh child that had been based upon her voluntary surrender of her first four children, and DCF's attempted termination of her rights in her fifth and sixth children because of medical neglect. *Id.* at 1116. After mediation, the mother surrendered her rights to the fifth child and her rights to the sixth were terminated because she had failed to comply with the DCF case plans. *Id.* at 1116-17. However, the record for termination proceedings for the seventh child showed extensive evidence that the mother was taking appropriate care of this child, voluntarily attending parenting classes, living on her own, and holding down a job. *Id.* at 1118-19.

205. *Id.* at 1124.

206. *F.L.*, 849 So. 2d at 1116.

burden not only to establish a ground for termination but the continuing substantial risk of harm to the current child.”²⁰⁷ There is far more accord among the district courts of appeal in dependency proceedings involving prospective abuse or neglect. In *O.S. v. Department of Children & Families*,²⁰⁸ the DCF initiated a dependency action for two children based upon a mother’s excessive corporal punishment of one of the children.²⁰⁹ Relying upon *J.C. v. Department of Children & Families*,²¹⁰ the mother claimed that corporal punishment in and of itself was not sufficient to order dependency.²¹¹ However, the court held that the evidence supported a charge of abuse, based upon substantial bruising that was present six weeks after the incident and evidence of mental injury to the child.²¹² Furthermore, the court held that dependency could be found as to the second child who had not been beaten, when the evidence “support[ed] a nexus between the act of abuse and any prospective abuse to another sibling.”²¹³

The concept of nexus is a key issue in a line of dependency cases dealing both with step-children and natural children. In *M.N. v. Department of Children & Families*,²¹⁴ the Fifth District held that evidence that a father had abused a step-child was not sufficient to find that his natural child was dependent, stating that additional proof in the form of independent evidence was required to prove a nexus between the past abuse and the prospective abuse.²¹⁵ The court went on to say that this nexus was most often established through the presence of an ongoing mental or emotional condition of the parent.²¹⁶ The father had been shown to have below average intellectual ability. However, this did not constitute a mental condition that would make the allegations of future abuse likely.²¹⁷ Likewise, in *In re C.M.*²¹⁸ a father’s biological children were adjudicated dependent based solely upon evidence that the father had abused his step-children.²¹⁹ However, the Second District Court of Appeal found that the evidence relied upon by the DCF was insuffi-

207. *Id.* at 1122.

208. 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).

209. *Id.* at 1146.

210. 773 So. 2d 1220 (Fla. 4th Dist. Ct. App. 2000).

211. *O.S.*, 821 So. 2d at 1146. For further discussion of corporal punishment, see *infra* Part II.A.

212. *Id.* at 1148.

213. *Id.*

214. 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).

215. *Id.* at 447–48.

216. *Id.* at 448.

217. *Id.* at 449.

218. 844 So. 2d 765 (Fla. 2d Dist. Ct. App. 2003).

219. *Id.*

cient to establish a nexus between the abuse of the step-children and prospective abuse of his biological children, and the DCF provided no evidence of an ongoing condition that would make abuse of his natural children highly probable.²²⁰

The Fourth District continued this line of reasoning in *J.B.P.F. v. Department of Children & Families*.²²¹ Here, the court held that the evidence was insufficient to establish a nexus between one instance of a mother's abuse of her son and the risk of prospective abuse of her other child.²²² Although both were the mother's natural children, the court looked at evidence showing that the son suffered "severe psychological and behavioral problems," making him extremely difficult to discipline.²²³ The other child was well adjusted, and the dynamic between this child and the mother was quite different from the dynamic between the son and the mother.²²⁴ However, the court also noted that there was evidence of domestic violence between the mother and her live-in boyfriend that had perhaps occurred in the presence of this second child.²²⁵ Section 39.01(30)(i) of the *Florida Statutes* allows domestic violence in the presence of children to serve as the basis for harm to the child.²²⁶ Unwilling to reverse the dependency adjudication outright based upon this evidence of domestic violence, the court remanded the case for a factual determination of whether the child ought to be adjudicated dependent based upon the domestic violence.²²⁷

Another dependency case addressed the question of whether a father's six-year-old DUI conviction could serve as the basis for a charge of prospective neglect to render a child dependent.²²⁸ In *P.S. v. Department of Children & Families*, discussed in the "Dependency" section above, the Second District held that the DUI arrest was too remote in time, having occurred even before the child was born, to predict clearly and convincingly any substantial

220. *Id.* at 766.

221. 837 So. 2d 1108 (Fla. 4th Dist. Ct. App. 2003).

222. *Id.* The son had been adjudicated dependent based upon an incident of "excessive" discipline where the mother and her live-in boyfriend physically restrained the child with handcuffs and poured an entire bottle of hot sauce into his mouth. *Id.* at 1109. The court noted that the mother had sought help with the son, acknowledging her difficulty in raising him by initiating contact with DCF to get assistance in parenting him appropriately. *Id.* at 1110.

223. *Id.* at 1108.

224. *J.B.P.F.*, 837 So. 2d at 1110.

225. *Id.*

226. *Id.*

227. *Id.* at 1111.

228. *P.S. v. Dep't of Children & Families*, 825 So. 2d 530 (Fla. 2d Dist. Ct. App. 2002).

risk to the child.²²⁹ In fact, the court noted that evidence of the arrest was not relevant to any material fact at issue.²³⁰

In *D. Children v. Department of Children & Families*,²³¹ also discussed in the “Dependency” section above, the court upheld the dependency of the three children as to both the mother and the father, based upon the apparent abuse or neglect of one child.²³² The court looked at the totality of the circumstances, as per *M.F.*,²³³ noting that the court had broad discretion when dealing with child welfare, that there was sufficient evidence to affirm dependency as to the mother, the perpetrator of the abuse had not been established, and the family was intact with both parents being the only adults who had access to the abused infant prior to injury.²³⁴

Although the districts have been consistent in the treatment of prospective neglect and abuse in a dependency setting, it is clear that the application of the doctrine in the context of termination of parental rights is an issue rife with uncertainty among Florida’s appellate courts. This issue will continue to stir up conflict until the matter is ultimately resolved by the Supreme Court of Florida.

V. JUVENILE DELINQUENCY

A. Adjudicatory Issues

It is a basic principle that the prosecutor in criminal and juvenile delinquency cases has the authority relating to the allocation of prosecutorial resources and may use discretion in deciding which cases to file charges.²³⁵ In *State v. D.W.*,²³⁶ the State filed a petition for delinquency against a child for threatening a teacher.²³⁷ After reading the arrest report the trial judge, *sua sponte*, dismissed the petition with prejudice.²³⁸ The State appealed and the appellate court reversed.²³⁹ It held that in a juvenile delinquency proceeding

229. *Id.*

230. *Id.*

231. 820 So. 2d 980 (Fla. 4th Dist. Ct. App. 2002).

232. *Id.*

233. *In re M.F.*, 770 So. 2d 1189 (Fla. 2000).

234. *D. Children*, 820 So. 2d at 982. Police never identified who caused the injury. *Id.* at 981. In a somewhat bizarre twist, the mother told medical personnel that she thought the injury had been caused by the family Dachshund. *Id.* None of the experts who testified found this claim credible. *Id.*

235. *See generally* *State v. Earl*, 545 So. 2d 415 (Fla. 3d Dist. Ct. App. 1989).

236. 821 So. 2d 1179 (Fla. 3d Dist. Ct. App. 2002).

237. *Id.*

238. *Id.*

239. *Id.*

the court did not have the power to dismiss without giving the State an opportunity to present evidence.²⁴⁰ While the court did review the arrest report, such review did not constitute proper substitute for the State's presentation of evidence.²⁴¹

Sometimes juveniles claim they are adults when arrested in order to bond out of jail rather than be held in secure detention for twenty-one days, as required by Florida law. In *T.W. v. Jenne*²⁴² a child who was fifteen, but represented that he was eighteen, brought a writ of habeas corpus for release from the Broward County Jail.²⁴³ The juvenile had been released on bond, but when he missed his court appearance he was held in the adult jail without bond.²⁴⁴ The writ sought a determination that he was a juvenile and that he should be treated as such.²⁴⁵ In an earlier case, *Williams v. State*,²⁴⁶ the juvenile who had lied about his age to obtain a favorable probation sentence was sentenced to 364 days in jail for violation of probation.²⁴⁷ The child, who it turns out, was sixteen, moved to vacate the adult conviction and sentence.²⁴⁸ The appellate court in *Williams* held that the child had waived his right to be treated as a juvenile by lying about his age and failing to disclose his age at a plea conference to secure a favorable bond and probation sentence.²⁴⁹ The court in *T.W.* distinguished *Williams* on the grounds that the correction sought in *T.W.* occurred early in the case rather than after receiving a more beneficial and lenient sentence as in *Williams*.²⁵⁰ The court concluded in *T.W.* that the child did not "unalterably waive" his right to be treated as a juvenile.²⁵¹

School students often make threats, sometimes of violent activities, and such behavior has been the subject of substantial discussion in the media.²⁵² Such threats often result in charges of juvenile delinquency. Section 790.163 of the *Florida Statutes* provides that "it is unlawful for any person to make a false report, with intent to deceive, mislead, or otherwise misinform any per-

240. *Id.*

241. *D.W.*, 821 So. 2d at 1180.

242. 826 So. 2d 536 (Fla. 4th Dist. Ct. App. 2002).

243. *Id.*

244. *Id.*

245. *Id.* at 536–37.

246. 754 So. 2d 67 (Fla. 4th Dist. Ct. App. 2000).

247. *Id.* at 68.

248. *Id.*

249. *Id.* (citing *Smith v. State*, 345 So. 2d 1080 (Fla. 3d Dist. Ct. App. 1997)).

250. *T.W.*, 826 So. 2d at 537.

251. *Id.*

252. *An Epidemic of Violence Incidents in Schools Rise Sharply Since Santee Shooting*, CNN.COM, Mar. 8, 2001, at <http://www.cnn.com/2001/US/03/08/alarmed.incidents/> (last visited Mar. 27, 2004).

son, concerning the placing or planting of any bomb, dynamite, or other deadly explosive.” In *D.B. v. State*,²⁵³ a juvenile public school student made “threats to school officials that he would ‘blow up’ or ‘burn down’ his school at some time in the future.”²⁵⁴ He was adjudicated delinquent upon those threats.²⁵⁵ The appellate court held that threats of future activity were not a violation of the statute.²⁵⁶ The court found that the threats could not fairly be characterized as a “false report” under the statute.²⁵⁷ The First District Court of Appeal relied upon an earlier decision by Maryland’s highest court, in *Moosavi v. State*,²⁵⁸ in which that court recognized that the crux of its statute was a finding that the telephone, mail, or other transmission was of false information.²⁵⁹ Thus, the Florida court in *D.B.* reversed the adjudication for the same reason—no showing of a false statement.²⁶⁰

In a second case involving the issue of unlawfully making a false report of a bomb,²⁶¹ a juvenile appealed from a disposition that committed him to the Department of Juvenile Justice (“DJJ”) for high-risk residential placement and then probation in *C.C.B. v. State*.²⁶² After the adjudication, the DJJ recommended in its report that the court place the child on probation and withhold adjudication of the delinquency.²⁶³ Departing from the DJJ recommendation, the trial court found that in 2001 there had been an epidemic of bomb threats made by young people and that it was necessary to send a message to other young people in the community, despite the fact that the child had no prior record.²⁶⁴ In *C.C.B.*, the appellate court reversed.²⁶⁵ Ruling as it had in an earlier case in *In re A.C.N.*,²⁶⁶ the First District Court of Appeals held that a court’s desire to send a message to the community’s youth is not a valid reason for disregarding the recommendation of the DJJ.²⁶⁷ Further, the court was required to explain why the commitment was necessary for a child who had no prior criminal record and why it was important for the safety of

253. 825 So. 2d 1042 (Fla. 1st Dist. Ct. App. 2002).

254. *Id.*

255. *Id.* at 1044.

256. *Id.* at 1043.

257. *Id.* at 1043–44.

258. 736 A.2d 285 (Md. 1999).

259. *Id.* at 291.

260. *D.B.*, 825 So. 2d at 1044.

261. See § 790.163.

262. 828 So. 2d 429, 430 (Fla. 1st Dist. Ct. App. 2002).

263. *Id.*

264. *Id.*

265. *Id.* at 433.

266. 727 So. 2d 368, 370 (Fla. 1st Dist. Ct. App. 1999).

267. *Id.*

the community.²⁶⁸ Because the departure was not supported by competent substantial evidence, the appeals court in *C.C.B.* reversed.²⁶⁹

Minors may be adjudicated delinquent on the basis of searches conducted in school. In 1985, the Supreme Court decided *New Jersey v. T.L.O.*,²⁷⁰ where the Court established that school officials must have a reasonable ground to suspect that the search would result in evidence that the student has violated either the law or school rules.²⁷¹ *A.N.H. v. State*,²⁷² was a case where a school teacher advised a school counselor that the teacher was concerned about a student.²⁷³ The teacher, believing that the child “was not ‘acting himself,’ had bloodshot eyes, and that ‘something wasn’t right,’” requested that the student empty his front pockets, where he discovered marijuana.²⁷⁴ Relying upon *T.L.O.*, the appellate court held that the student’s behavior could have resulted from a variety of non-criminal circumstances and, as such, did not rise to reasonable grounds to suspect the child was involved in criminal activity.²⁷⁵ The appellate court reversed.²⁷⁶

The battle over constitutionality of juvenile curfew ordinances continues in Florida. In 2001, the Supreme Court of Florida, in *T.M. v. State*,²⁷⁷ and *M.R. v. State*,²⁷⁸ involving juvenile curfew ordinances in the city of Pinellas Park and Tampa, ruled that the Second District Court of Appeal had applied a heightened scrutiny test rather than the strict scrutiny test, and thus remanded.²⁷⁹ On remand, the court in *J.P. v. State*,²⁸⁰ and *M.R. v. State*,²⁸¹ held that the ordinance in Tampa was unconstitutional under a strict scrutiny standard and the Supreme Court of Florida noted jurisdiction in both cases.²⁸²

The State often seeks to hold delinquents in pretrial detention past the twenty-one days as provided by Florida law²⁸³ when the state intends to file other charges against the child.²⁸⁴ For the second time, a Florida appeals

268. *Id.*

269. *C.C.B.*, 828 So. 2d at 433.

270. 469 U.S. 325 (1985).

271. *Id.* at 341.

272. 832 So. 2d 170 (Fla. 3d Dist. Ct. App. 2002).

273. *Id.* at 171.

274. *Id.*

275. *Id.* at 172.

276. *Id.*

277. 784 So. 2d 442 (Fla. 2001).

278. 788 So. 2d 957 (Fla. 2001).

279. *T.M.*, 784 So. 2d at 443–44; *M.R.*, 788 So. 2d at 958.

280. 832 So. 2d 110 (Fla. 2d Dist. Ct. App. 2002).

281. 832 So. 2d 121 (Fla. 2d Dist. Ct. App. 2002).

282. *J.P.*, 832 So. 2d at 113–14; *M.R.*, 832 So. 2d at 122.

283. See § 985.215(5)(c).

284. *Id.*

court has held that extending detention for an additional period of time based upon the state's articulation of intent to file charges in adult court without a showing of good cause is impermissible.²⁸⁵ The court thus ruled that the trial court lacked grounds to continue the detention despite the fact that it dismissed the child's petition for writ of certiorari as moot while deciding the issue.²⁸⁶ Good cause would involve such circumstances as where witnesses were unavailable or an investigation was incomplete.²⁸⁷

For over a decade, this author has reported on the failure of Florida trial courts to comply with the United States Supreme Court's ruling in *In re Gault*²⁸⁸ by not properly advising juveniles of their right to counsel.²⁸⁹ In *A.L. v. State*,²⁹⁰ the Fourth District Court of Appeal reversed a dispositional order for failure of the trial court "to renew the offer of counsel to the juvenile after [the juvenile] had waived counsel at an earlier proceeding" because the *Florida Rules of Juvenile Procedure* compelled the court "to offer counsel at each subsequent stage of the proceedings."²⁹¹

B. Dispositional Issues

For a number of years now, the Florida state courts, based on separation of powers, have refused to intervene and force the state DCF and the state DJJ to provide appropriate services for children in the care of those two agencies. In *Department of Children & Family Services v. M.H.*,²⁹² the appellate court was faced with a petition by the DCF to avoid the obligation to place four juveniles facing delinquency charges but found to be incompetent, into appropriate facilities for their treatment.²⁹³ Instead, the children were housed in the local detention center.²⁹⁴ Once again commenting on "the circuit court's impatience with the state of affairs which allows incompetent children to be warehoused in detention facilities due to insufficient bed space to begin treatment designed to restore their competency," the court also commented on the dilemma faced by the DCF to provide treatment when sufficient funds have not been allocated.²⁹⁵ Based on separation of powers

285. *T.T. v. Esteves*, 828 So. 2d 449, 451 (Fla. 4th Dist. Ct. App. 2002).

286. *Id.*

287. *Id.*; see *E.W. v. Brown*, 559 So. 2d 712 (Fla. 1st Dist. Ct. App. 1990).

288. 387 U.S. 1 (1967).

289. See *Dale*, *supra* note 9, at 904.

290. 841 So. 2d 676 (Fla. 4th Dist. Ct. App. 2003).

291. *Id.*; see also *M.Q. v. State*, 818 So. 2d 615, 618 (Fla. 5th Dist. Ct. App. 2002).

292. 830 So. 2d 849 (Fla. 2d Dist. Ct. App. 2002).

293. *Id.* at 850.

294. *Id.*

295. *Id.*

grounds in case law, the appellate court held that the trial court was without authority to compel the DCF to place the children in programs for which space is simply not available, citing the variety and number of prior court cases.²⁹⁶ The problem, of course, has been compounded by the failure of the federal courts to recognize the problems in the foster care system and the inability of the state courts to resolve them. In *31 Children v. Bush*,²⁹⁷ the Eleventh Circuit recently held that such matters should be resolved in dependency court.²⁹⁸ The catch-22 situation that results is blatant.²⁹⁹

In the adult criminal justice system, defendants receive credit for time served, which may even include time spent in the mental institution due to involuntary commitment.³⁰⁰ However, the juvenile justice system is designed to rehabilitate youngsters; and therefore, juveniles may be placed in commitment status for indeterminate periods of time.³⁰¹ But in *C.C. v. State*,³⁰² the appellate court held that the juvenile was entitled to credit for time spent in secure detention because the adjudication was a misdemeanor for which the maximum period of commitment was statutorily limited to one year.³⁰³ The juvenile was committed within one year of reaching the age of nineteen.³⁰⁴ In this determinate setting, the court held that the credit for time served was appropriate.³⁰⁵

One of the dispositional alternatives available to the court under Florida law is restitution.³⁰⁶ Under the Florida restitution statute found in Chapter 985, the court may, under certain circumstances, in addition to the sanctions imposed upon the child, order the parent to pay restitution in money or in

296. *Id.*

297. 329 F.3d 1255 (11th Cir. 2003), *cert. denied sub. nom.* Reggie v. Bush, 124 S.Ct. 483 (2003).

298. *Id.* at 1279.

299. See *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003); see also *Dep't of Children & Family Servs. v. I.C.*, 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999); *Dep't of Health & Rehab. Servs. v. Bills*, 661 So. 2d 69 (Fla. 2d Dist. Ct. App. 1995); *Singletary v. Acosta*, 659 So. 2d 449 (Fla. 3d Dist. Ct. App. 1995); *Quiala v. State*, 659 So. 2d 287 (Fla. 3d Dist. Ct. App. 1994); *Dep't of Health & Rehab. Servs. v. Pelz*, 609 So. 2d 155 (Fla. 5th Dist. Ct. App. 1992); *Dep't of Health & Rehab. Servs. v. Stoutamire*, 602 So. 2d 564 (Fla. 2d Dist. Ct. App. 1992); *Dep't of Health & Rehab. Servs. v. V.L.*, 583 So. 2d 765 (Fla. 5th Dist. Ct. App. 1991); *Dep't of Health & Rehab. Servs. v. Nourse*, 437 So. 2d 221 (Fla. 4th Dist. Ct. App. 1983).

300. See *Tal-Mason v. State*, 515 So. 2d 738, 740 (Fla. 1987).

301. *C.C. v. State*, 841 So. 2d 657, 658 (Fla. 4th Dist. Ct. App. 2003).

302. *Id.* at 657.

303. *Id.* at 658–59.

304. *Id.* at 658.

305. *Id.* 658–59.

306. § 985.231(1)(a)(9).

kind, for damage which has resulted from the child's offense.³⁰⁷ In *Fisher v. State*,³⁰⁸ the child pleaded no contest and was adjudicated a delinquent and placed in a Level Four program, resulting from a burglary and arson in which the child and two others broke into a vacant home and set it on fire, burning it to the ground.³⁰⁹ The court order included restitution payable by the parents.³¹⁰ It was the first notice or statement by the judge or the State that the mother was to be held personally liable for restitution.³¹¹ She failed to make payment and she was held in contempt.³¹² After entering the order requiring restitution, the court actually held a restitution hearing in which it heard testimony about its value.³¹³ The court entered an order requiring the mother to pay restitution in the amount of \$25,861 and to pay \$250 a month.³¹⁴ The mother told the judge that her income was \$21 per hour and that she could not afford to pay restitution.³¹⁵ The statute requires the court to find that the parent failed to make diligent and good faith efforts to prevent the child from engaging in the delinquent acts prior to making an order that the parent perform community service.³¹⁶ However, the statute does not explicitly require a similar finding when the question is one of restitution.³¹⁷ The court remanded the case for a hearing because it found that there was no finding made that the mother failed to make any diligent and good faith effort, that there was no evidence of her parenting efforts, and because statutes in derogation of the common law ought to be narrowly construed.³¹⁸ The court also reversed on due process grounds because the mother had never received notice.³¹⁹ She was not a party to the daughter's juvenile delinquency proceeding although she appeared in her role as parent and possible witness.³²⁰ She might be subjected to an order of restitution as the court's ruling was "without prejudice to the right of the state to seek to reimpose restitution sanctions . . . should that be appropriate under the new juvenile rules."³²¹ The

307. *Id.*

308. 840 So. 2d 325 (Fla. 5th Dist. Ct. App. 2003).

309. *Id.* at 327.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Fisher*, 840 So. 2d at 327.

314. *Id.*

315. *Id.*

316. See § 985.231(1)(a)(9); *Fisher*, 840 So. 2d at 329; *B.M. v. State*, 744 So. 2d 505, 510 (Fla. 5th Dist. Ct. App. 1999).

317. See § 985.231(1)(a)(9).

318. *Fisher v. State*, 840 So. 2d 325, 329–31 (Fla. 5th Dist. Ct. App. 2003).

319. *Id.* at 330.

320. *Id.*

321. *Id.* at 331.

problem of notice has been cured since the events that occurred in *Fisher*, due to changes to the *Florida Rules of Juvenile Procedure* requiring the State to file and serve the petition on the parent or guardian in cases where restitution or other sanctions are sought against them.³²²

C. Appellate Issues

In *Brazill v. State*, a case of wide public interest, in the spring of 2003 the Fourth District Court of Appeal ruled on the appeal of Nathaniel Brazill.³²³ Brazill was convicted as an adult for second degree murder and aggravated assault with a firearm of shooting and killing a teacher at his middle school during the 1999-2000 school year.³²⁴ In addition to a claim about prosecutorial misconduct in closing argument, Brazill challenged the statute under which he was charged.³²⁵ Specifically, he claimed that the statute, which allowed him to be charged with a violation of state law punishable by death or life imprisonment as an adult, thereby denying the rehabilitative system of the juvenile court, was unconstitutional in violation of due process, equal protection, and separation of powers.³²⁶ The appellate court found that there was no absolute right at common law or in the constitution to be treated in the juvenile system, and that nothing contained in *Kent v. United States*,³²⁷ the Supreme Court opinion on procedural due process in transfer cases, provided a right to be tried in the juvenile system.³²⁸ Further, the court held that no constitutional violation resulted from the prosecutor's use of broad discretion to charge as an adult.³²⁹

VI. STATUTORY CHANGES

The Florida Legislature in its 2003 Spring regular session made only minor changes to laws relating to children in the child welfare and juvenile justice systems. The Legislature expanded descriptions of persons who having mandatory reporting responsibilities with regard to child abuse, abandonment or neglect by redrafting section 39.201 of the *Florida Statutes*. The

322. *Id.* at 329 (citing FLA. R. JUV. P. 8.040, 8.030, 8.031).

323. 845 So. 2d 282 (Fla. 4th Dist. Ct. App. 2003); see Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager*, 28 NOVA L. REV. 507 (2004).

324. *Id.* at 286.

325. *Id.*

326. *Id.*

327. 383 U.S. 541 (1996).

328. *Brazill*, 845 So. 2d at 288 (citing *Kent*, 383 U.S. at 552-54).

329. *Id.* at 289.

Legislature noted that certain persons, under certain circumstances, are not obligated to make reports to the hotline.³³⁰ For example, a professional working with the DCF need not render a second report where the treatment is the result of a prior report.³³¹ Similarly, court officials are not obligated to report when there is an ongoing investigation by the DCF or where there is a dependency case where the matter has previously been reported to the DCF.³³² On the other hand, the Legislature reasserted the notion that community-based care providers have obligations to report suspected or actual child abuse, abandonment or neglect.³³³

The Legislature also slightly expanded the limitations on confidentiality of reports and records in cases of child abuse or neglect to allow access to services for victims of domestic violence to attorneys representing a child in civil and criminal proceedings,³³⁴ and to principals of public, private, and charter schools.³³⁵ Chapter 39 was also amended to allow for release of further information on children in the foster care system who are found to be missing.³³⁶

Finally, the Legislature passed section 39.8296 of the *Florida Statutes*, which created the Statewide Guardian Ad Litem Office to oversee the Guardian Ad Litem program.³³⁷ Previously, the Guardian Ad Litem program was “supervised by court administration within the circuit courts;” however, the Legislature found that “there [was] a perceived conflict of interest created by the supervision of program staff by the judges before whom they appear.”³³⁸ Therefore, the Legislature passed section 39.8296 of the *Florida Statutes* with the intent to “place the Guardian Ad Litem Program in an appropriate place and provide a statewide infrastructure to increase functioning and standardization among the local programs currently operating in the 20 judicial circuits.”³³⁹ That location is the Justice Administrative Commission.

VII. CONCLUSION

The Supreme Court of Florida has ruled in an important case involving appellate practice in termination cases, holding that the *Anders* standard does

330. § 39.201(1)(b).

331. § 39.201(1)(c)-(d).

332. *Id.*

333. § 39.201(1)(e).

334. § 39.202(2)(5)(d).

335. *See* § 39.202(2)(p).

336. § 39.202(4).

337. § 39.8296(2).

338. § 39.8296(1)(b).

339. § 39.8296(1)(d).

not apply to lawyers who seek to withdraw where there is no colorable appeal for a client in a termination of parental rights case.³⁴⁰ The application of the *Padgett* doctrine continues to be an issue discussed by the appellate courts in dependency and termination cases.³⁴¹ In delinquency matters, the appellate courts continue its longstanding effort to hold the trial courts accountable for compliance with the variety of procedural obligations under Florida law.³⁴² The Legislature moved the state office of guardian *ad litem* from the Supreme Court to a freestanding agency.³⁴³

340. N.S.H. v. Fla. Dep't of Children & Family Servs., 843 So. 2d 898, 904 (Fla. 2003).

341. See, e.g., P.S. v. Dep't of Children & Family Servs., 825 So. 2d 530 (Fla. 2d Dist. Ct. App. 2002); O.S. v. Dep't of Children & Families, 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002); M.N. v. Dep't of Children & Family Servs., 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).

342. See, e.g., A.L. v. State, 841 So. 2d 676 (Fla. 4th Dist. Ct. App. 2003).

343. § 39.8296.

TATE v. STATE: HIGHLIGHTING THE NEED FOR A MANDATORY COMPETENCY HEARING

STEVEN BELL*

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Arrival time is 8:15 a.m.¹ Attorneys conjure up thoughts of issues, such as what time the judge will take the bench, how full is the morning docket and whether it has been updated, how many arraignments have been scheduled,² children on pickup order status,³ termination of a plea and pass,⁴ af-

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1. This is an account of my personal experience as a Certified Legal Intern with the Broward County Public Defender's Office, Juvenile Division. I was an Intern during the Fall semester of my third year of law school, interning for a period of two and a half months.

2. An arraignment is the step in a criminal prosecution where the defendant is brought before the court for a formal reading of a charges and entering of a plea. BLACK'S LAW DICTIONARY 82 (7th ed. 1999).

ternoon docket, number of trials, witnesses and whether they have been subpoenaed, violation of probation hearings,⁵ and on and on. The adversarial playground called juvenile court awaits the arrival of a public defender. Children and their families line the benches inside the courtroom. Stacks of delinquency petitions are placed neatly next to the large pile of face sheets.⁶ The first child of the day, only fourteen years old, had pled no-contest to a first-degree felony six months earlier. Now he faces third-degree felony and first-degree misdemeanor charges. After speaking with the 5'3", 150 pound adolescent about the charges, the lawyer notices his face is blank. Obviously confused, he turns to his mother. The unfortunate truth is that he barely understands how he arrived at the courthouse, let alone the charges that he is facing. His mother, aware of this reality, begins to cry. The lawyer poses questions, which are answered by the mother and child.

The youth's psychological history is extensive and severe, ranging from bipolar disorders to anger management issues. Although an attorney's day is overflowing with time pressures and obligations, under these circumstances, at the top of his to-do list should be filing a motion for competency.⁷

I. INTRODUCTION

It is imperative that a criminal defendant understands the nature of the proceedings against him and has the ability to assist his defense counsel during trial.⁸ Whether tried in juvenile court or as an adult in criminal court, the

3. *A.M.W. v. Portesy*, 714 So. 2d 1170, 1171 (Fla. 2d Dist. Ct. App. 1998) (describing the term "pick-up order" as one often used in juvenile proceedings to describe the orders to take the children into custody); *see also* FLA. STAT. § 985.207(3) (2003) (stating that taking a child into custody is not equivalent to an arrest, but will precede a finding of whether the taking was a lawful one).

4. Term describing a state's offer to a child when he or she is a first time offender. This is most commonly offered for minor misdemeanors and if completed successfully often results in the state's dismissal of the charges.

5. Probation is a court-imposed criminal sentence that, subject to certain conditions, calls for the release of the convicted person back into the community instead of prison time. BLACKS LAW DICTIONARY 978 (7th ed. 1999).

6. *P.H. v. Fryer*, 570 So. 2d 1096, 1097 (Fla. 4th Dist. Ct. App. 1990) (describing the juvenile's "face sheet" and probable cause affidavit as evidencing his prior charges in the juvenile court system).

7. *See* § 985.223 (providing circumstances for which a competency evaluation may be raised); *see also* FLA. R. JUV. P. 8.095 (stating the procedures involved when competency of a juvenile is raised).

8. THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 83 (David Anson & Debra Fink eds., 1998) [hereinafter GRISSO I]; *see also* *Dusky v. United States*, 362 U.S. 402, 402 (1960) (holding that the test for competency must be whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—

concept remains the same: a child must be competent to stand trial.⁹ This article focuses on competency questions and the attorney's obligations when representing a minor. Beginning with Part II and through Part VII, this article focuses on the impact of the *Tate* decision. Part VIII analyzes the history of due process rights in juvenile court, including the right to counsel, by sifting through the rationales of two landmark juvenile cases.¹⁰ Part IX emphasizes the importance of a juvenile's right to be tried while competent. Part X tackles the predicament lawyers often encounter when they disregard the duty to file a motion for competency: ineffective assistance of counsel.¹¹ Part XI addresses the judge's role in determining whether a juvenile is competent. Part XII proposes a legislative change requiring a mandatory competency hearing for a youth under the age of sixteen charged with a serious crime. Part XIII will conclude that a mandatory competency hearing is crucial, without which, a youth is not sufficiently protected in the criminal justice system.

II. THE TATE OPINION

The grand jury returned a first-degree and felony murder indictment against Lionel Tate on August 11, 1999.¹² Tate was only twelve years old.¹³ Evidence introduced at trial demonstrated that he viciously killed Tiffany Eunick.¹⁴ In fact, his six-year-old victim sustained in excess of thirty-five injuries, including a skull fracture, contusions to the brain, more than twenty bruises, a fractured rib, kidney and pancreas wounds, and a detached liver.¹⁵ Tate was convicted of premeditated murder.¹⁶ Despite Tate exhibiting odd behavior during trial, which should have raised serious questions about his

and whether he has a rational as well as factual understanding of the proceedings against him.").

9. GRISSO I, *supra* note 8.

10. U.S. CONST. amend. XI; FLA. CONST. art. I, § 16; *see also* FLA. R. JUV. P. 8.165 (stating that court has a duty to advise a child of his or her right to counsel and unless that right is waived by the child, that counsel shall be appointed at each and ever stage of the proceedings).

11. *Strickland v. Washington*, 466 U.S. 668, 669 (1984). *Tate* does not discuss this issue because it was not raised on appeal. *Tate v. State*, 864 So. 2d 44, 47-54 (Fla. 4th Dist. Ct. App. 2003) (discussing the points on appeal, none of which raised the issue of ineffective assistance of trial counsel).

12. Jodie Needle, *Boy Charged With Murder in Death of Playmate*, SUN-SENTINEL (Ft. Lauderdale), Aug. 12, 1999, at B2.

13. *Tate*, 864 So. 2d at 47.

14. *Id.*

15. *Id.* Experts on both sides agreed these injuries were not the result of an accident. *Id.*

16. *Id.*

competency, a motion for a competency evaluation or a hearing was not filed until the post-trial hearing.¹⁷

III. THE ATTORNEY-CLIENT PRIVILEGE

Tate's post-trial and appellate attorney, Richard Rosenbaum, called for that post-trial hearing to demonstrate Tate lacked the competency to stand trial prior, during, and subsequent to trial.¹⁸ The testimony of Tate's trial counsel, Jim Lewis,¹⁹ was sought by Rosenbaum, but would only be allowed if Tate waived the attorney-client privilege.²⁰ At the hearing, Rosenbaum argued Tate did not appreciate the consequences of refusing to waive the attorney-client privilege.²¹ Indeed, the record indicated Tate merely followed his mother's orders not to waive.²² Nevertheless, despite the fact that both attorneys, Rosenbaum and Lewis, took the position that it was in his "best interests to waive the privilege," after conferring with his mother, Tate refused.²³ Consequently, the trial judge refused to allow Lewis to testify and held that raising the competency issue after Tate had been convicted was untimely.²⁴ Therefore, the court denied the post-trial motion for a competency evaluation and a hearing.²⁵

IV. THE ISSUE ON APPEAL

As a result of that denial, the main issue on appeal was whether a competency evaluation was constitutionally mandated.²⁶ More specifically, the Fourth District Court of Appeal questioned whether Tate had had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as factual, understand-

17. *Tate*, 864 So. 2d at 47. His appellate counsel argued Tate was not competent during any stage of the proceedings. *Id.* The primary thrust of that competency motion was that Tate did not understand the consequences of going to trial and could not assist counsel before, during or after trial. *Id.*

18. *Id.*

19. *Needle*, *supra* note 12.

20. *Tate*, 864 So. 2d at 48 (Fla. 4th Dist. Ct. App. Dec. 10, 2003). Lewis wanted to testify for him so that the court would be aware of what led to his belief that Tate was not competent during trial. *See* Paula McMahon, *Attorneys Renew Bid for Evaluation of Tate*, SUN-SENTINEL (Ft. Lauderdale), Mar. 7, 2001, at B3.

21. *Tate*, 864 So. 2d at 48.

22. *Id.*

23. *Id.* at 48-49.

24. *Id.*

25. *Id.*

26. *Tate*, 864 So. 2d at 48.

ing of the proceedings against him.”²⁷ Tate’s lack of understanding was evident though his behavior.²⁸ Although Lewis was prohibited from testifying about Tate’s behavior during the trial, his troubling demeanor and attitude during the post-trial hearing supported a need for a competency hearing.²⁹ For example, Rosenbaum argued that Tate was drawing pictures, not listening, apparently oblivious to the proceedings, and simply not helping with his defense.³⁰ In addition, Tate lacked any real comprehension of his situation.³¹ Rosenbaum pointed to such indications as that his eyes constantly wandered, illustrating a lack of comprehension of his situation.³² Nevertheless, the judge completely disregarded Rosenbaum’s arguments, concluding a “lack of interest in the proceedings did not equate with incompetency.”³³

V. THE EXPERT TESTIMONY AT TRIAL

However, due to the extensive and significant defense expert testimony at trial concerning Tate’s inability to understand his situation, the competency issue should have been addressed in the lower court.³⁴ It went uncontroverted that Tate possessed an IQ of approximately ninety.³⁵ Furthermore, Wiley Mittenberg,³⁶ a neuropsychologist, testified Tate’s mental age was equivalent to that of a nine or ten-year-old.³⁷ Joel Klass, a child psychologist, explained that Tate had the social maturity of a six-year-old.³⁸ Lastly,

27. *Id.*; see also *Dusky v. United States*, 362 U.S. 402, 402 (1960).

28. *Tate*, 864 So. 2d at 48.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Tate*, 864 So. 2d at 48.

34. *Id.*

35. *Id.*; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39, 45 (4th ed. 1994) (explaining the essential feature of mental retardation as subaverage intellectual functioning coupled with limited adaptive abilities). Intellectual abilities are considered together with adaptive abilities, i.e., communication, self-care, self-direction, health and safety. AMERICAN PSYCHIATRIC ASSOCIATION, *supra*, at 39. Taking into account a measurement error of about five points, a person with an IQ of 70 may be considered mildly retarded. *Id.* at 39–40. Furthermore, even one with an IQ of 75 can be considered mildly retarded when he lacks certain adaptive functions. *Id.* An IQ of 71–84 describes a person with borderline intellectual functioning. *Id.* at 45.

36. *Attorneys Argue Prison Fate of Convicted Teen Murderer*, CNN.COM, Mar. 2, 2001, <http://edition.cnn.com/2001/LAW/03/02/wrestling.death.02/> (last visited Mar. 27, 2004).

37. *Tate*, 864 So. 2d at 48.

38. *Id.*

even the State's expert witness, Sherri Bourg-Carter, testified Tate was immature.³⁹

VI. THE STATE'S POSITION REGARDING TATE'S COMPETENCY

Notwithstanding Bourg-Carter's earlier testimony at trial, at the post-trial hearing, she opined that Tate was legally competent.⁴⁰ Moreover, she testified that a pre-trial "evaluation" was performed, and Tate's trial counsel was aware of it.⁴¹ Furthermore, a pre-trial agreement between Bourg-Carter and John Spencer, a defense expert psychologist, called for certain "examinations" to be performed to prevent Tate from being subjected to repeated testing.⁴² Bourg-Carter acknowledged that competency was a logical issue that a forensic psychologist would "need to consider."⁴³ However, neither a formal competency hearing nor an evaluation was ever performed.⁴⁴ As a result, Tate's ability to proceed to trial was never examined in a formal competency hearing.⁴⁵

VII. THE ULTIMATE DECISION BY THE FOURTH DISTRICT COURT OF APPEAL

The Fourth District Court of Appeal reversed the conviction.⁴⁶ The court held that the denial of the defense's post-trial demand for a competency evaluation, combined with the trial court's failure to order, *sua sponte*,⁴⁷ a pre-trial competency evaluation, violated due process.⁴⁸ The decision focused on 1) Tate's age and immaturity, 2) facts that evolved pre- and post-

39. *Id.*

40. *Id.* at 49.

41. *Id.*

42. *Tate*, 864 So. 2d at 49. The State also pointed the court's attention to the plea hearing. *Id.* Tate's trial lawyer, during this plea hearing, consulted with Tate and his mother. *Id.* The record revealed that Tate was not willing to accept the plea offer and desired to move forward to trial. *Id.* The judge conferred with Tate who informed the court that he had had plenty of time to speak with his mother and wanted to proceed. *Id.* Furthermore, he asserted he had not been coerced and had no questions about his choice. *Tate*, 864 So. 2d at 49. Without a formal competency hearing or even an evaluation, the judge found that "Mr. Tate has sufficient ability to make a decision in this very important matter." *Id.*

43. *Id.*

44. *Id.* at 48.

45. *Id.*

46. *Tate*, 864 So. 2d at 48.

47. BLACKS LAW DICTIONARY 1155 (7th ed. 1999) (defining the term "*sua sponte*" meaning on the court's own motion or without prompting or suggestion).

48. *Tate*, 864 So. 2d at 46. See generally Paula McMahon, *Court Tosses Verdict Ruling: Teen's Murder Conviction Reversed Reason: Judge Failed to Order Competency Test*, SUN SENTINEL (Ft. Lauderdale), Dec. 11, 2003, at A1.

trial, 3) Tate's lack of experience with the court system, and 4) the complexity of the legal proceedings against him.⁴⁹

VIII. JUVENILES AND DUE PROCESS

A. History of Due Process

The Illinois Juvenile Court Act of 1899 established the first court for delinquents under sixteen.⁵⁰ It mandated that a child's records must remain confidential to lessen the stigma of adjudication.⁵¹ Constitutional protections were considered unnecessary because children were kept separated from incarcerated adults and the emphasis was on rehabilitation.⁵² For approximately the next seventy years, the lack of the right to counsel was justified through the doctrine of *parens patriae*, which allowed the State to act in the best interests of the child rather than to punish him.⁵³ Thus, the proceedings were not considered adversarial, rendering competency to proceed to trial and participate in his defense immaterial.⁵⁴ By contrast, competency to stand trial in the adult criminal justice system dates back to 1836, sixty-three years prior to the Illinois Juvenile Court Act.⁵⁵ *R v. Pritchard* involved a deaf and dumb adult defendant whose attorney questioned his "fitness to stand trial."⁵⁶

Pritchard, irrespective of its application to juveniles, is an example of how the concept of incompetency entered into the criminal justice system and why it barred conviction.⁵⁷ The court focused on the defendant's competency and established three elements for determining fitness to stand trial:

49. *Tate*, 864 So. 2d at 50.

50. Robert E. Shepherd, Jr., *Still Seeking the Promise of Gault: Juveniles and the Right to Counsel*, 18 CRIM. JUST. 23, 23 (2003).

51. *Id.* This court was established in Cook County, Illinois and was set up to be a more forgiving setting than the adult criminal court. *Id.* Juveniles were kept separate from adults when incarcerated and detention of any juveniles under the age of twelve was not allowed. *Id.*; see BLACK'S LAW DICTIONARY 33 (7th ed. 1999) (defining the term "adjudication" as the process of judicially deciding a case).

52. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 338 (1999).

53. Shepherd, *supra* note 50; Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 296 (2003) (arguing that the civil nature of the proceedings distinguished the juvenile system from that of the adult system).

54. GRISIO I, *supra* note 8, at 85.

55. THOMAS GRISIO, *YOUTH ON TRIAL—A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 74 (2000) [hereinafter GRISIO II].

56. *Id.* (citing *R. v. Pritchard*, 173 Eng. Rep. 135 (K.B. 1836)).

57. *Id.*

1) whether the defendant “stood mute of malice;”⁵⁸ 2) whether the defendant is capable of pleading to the indictment; and 3) whether the defendant possesses the sufficient intellect to comprehend the proceedings to form a proper defense.⁵⁹

The *Pritchard* “fitness to stand trial” test can be compared to the “adjudicative competency test” articulated by the United States Supreme Court in 1960.⁶⁰ *Dusky v. United States* required that a defendant have a “rational” understanding of the proceedings and have the cognitive ability to consult with his attorney.⁶¹ Thus, both *Pritchard* and *Dusky* focus on the defendant’s present ability to understand his current situation to participate in his defense.⁶² However, neither case addressed the problem that convicting an incompetent defendant, or failing to follow proper procedures to assess his competence when doubt has been raised, violates the Due Process Clause of the United States Constitution.⁶³

In *Drope v. Missouri*, the defendant was indicted for rape.⁶⁴ His counsel moved for a continuance seeking examination by a psychiatrist who had recommended an evaluation.⁶⁵ The judge denied the motion.⁶⁶ On the first day of the trial, the defendant’s wife testified that the defendant attempted to kill her the previous day.⁶⁷ On the second day, the defendant attempted suicide.⁶⁸ His lawyer then requested a mistrial because his client became hospitalized.⁶⁹ The court denied the motion concluding the defendant’s inability to attend was voluntary.⁷⁰ The defendant was convicted after which he filed a motion to vacate alleging that the rejection by the court of his request for a psychiatric evaluation violated his right to due process.⁷¹ The Missouri Court of Appeal held that neither the psychiatrist’s recommendation, nor his

58. *Id.* “A defendant who ‘stood mute’ of malice was said to being doing so willfully.” *Id.*

59. GRISIO II, *supra* note 55, at 74–75; *see also Pritchard*, 173 Eng. Rep. at 135.

60. GRISIO II, *supra* note 55, at 75; *see Dusky v. United States*, 362 U.S. 402, 402 n.9 (1960).

61. *Dusky*, 362 U.S. at 402.

62. GRISIO II, *supra* note 55, at 74–75.

63. *Id.* at 75; *see Drope v. Missouri*, 420 U.S. 162, 180 (1975).

64. *Drope*, 420 U.S. at 162.

65. *Id.* Although it is not stated in the case, the defendant’s trial lawyer must have consulted with a psychiatrist to determine whether his client should be evaluated.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Drope*, 420 U.S. at 162.

70. *Id.* The Supreme Court of Missouri affirmed the denial of the motion for a mistrial and held that the denial of the motion for a continuance was not an abuse of discretion. *Id.*

71. *Id.*

wife's testimony, raised sufficient question about his ability to proceed to trial to demonstrate a constitutional violation.⁷² However, the United States Supreme Court reversed, concluding that sufficient doubt of his competency was raised and that further inquiry was required.⁷³

Drope addressed the issue within the context of a trial, but the Supreme Court has also recognized that a defendant cannot enter a guilty plea unless he is mentally competent.⁷⁴ The bottom line is that, "[i]ncompetency bars adjudication, whether by plea or by trial."⁷⁵

While case law afforded an adult the procedural due process protection of not being tried while incompetent, lack of history and precedent make understanding the issue of a juvenile's right to be competent to stand trial an uphill battle.⁷⁶ Evaluating a juvenile's competency to proceed was considered unnecessary.⁷⁷ This was because the juvenile justice system was so set apart and distinct from that of adult criminal court.⁷⁸ The two systems differed in purpose and principle.⁷⁹ The purpose of juvenile court was rehabilitation for their alleged wrongdoing, rather than punishment.⁸⁰ While the two seminal cases of *Kent v. United States*⁸¹ and *In re Gault*⁸² failed to establish an absolute right for a juvenile to be competent to stand trial, the right can be logically inferred from their holdings.⁸³ Competency played practically no role in the juvenile justice system until 1966.⁸⁴ Both *Kent* and *In re Gault* granted minors several of the identical due process rights available to adult defendants.⁸⁵

In *Kent*, a fourteen-year-old was arrested after being reported for breaking into houses and attempting to snatch several purses.⁸⁶ Two years later, Morris A. Kent was arrested again, this time for housebreaking, robbery, and

72. *Id.*

73. *Drope*, 420 U.S. at 180.

74. *Id.* (citing *Godinez v. Moran*, 509 U.S. 389, 398 (1993)).

75. GRISSEO II, *supra* note 55, at 75.

76. *Id.* at 73.

77. GRISSEO I, *supra* note 8, at 85.

78. *Id.*

79. *Id.*

80. *Id.*; see *supra* note 53 and accompanying text.

81. 383 U.S. 541 (1966).

82. 387 U.S. 1 (1967).

83. Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 4, 6 (1997) [hereinafter Grisso III].

84. Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 CRIM. JUST. 20, 21 (2003).

85. *Id.*; see also GRISSEO III *supra* note 83. But see § 985.228(2) (stating that a juvenile is not entitled to a trial by jury).

86. *Kent*, 383 U.S. at 543.

rape.⁸⁷ Because he was not yet eighteen, Kent fell within the juvenile court's jurisdiction.⁸⁸ Kent's mother retained counsel for him the day after he was arrested.⁸⁹ Kent's attorney, along with his mother, met with the Social Service Director of the Juvenile Court to discuss the possibility of waiving jurisdiction.⁹⁰ His lawyer filed a motion opposing the waiver, asserting that his client was "a victim of severe psychopathology" and suggesting hospitalization for psychiatric observation.⁹¹ Kent's attorney argued that the court should retain jurisdiction and try Kent as a juvenile to stress rehabilitation.⁹² He also requested copies of the juvenile records used to determine whether to try Kent as an adult.⁹³ The judge did not rule or hold any hearings on those motions.⁹⁴ Furthermore, the judge rendered his decision without consulting Kent's attorney or his mother.⁹⁵ Instead, the court merely entered an order waiving jurisdiction and allowing him to be tried as an adult.⁹⁶ The judge simply stated that he made this decision as result of a "full investigation."⁹⁷ Following the indictment, Kent's counsel moved to dismiss, claiming the court erred by allowing Kent to be tried as an adult.⁹⁸ The motion was denied.⁹⁹ Kent's attorney appealed, asserting Kent was not afforded certain procedural rights that, under normal circumstances, would have been afforded to an adult.¹⁰⁰

Among other deprivations, he claimed Kent was denied his liberty without a probable cause determination, had been interrogated by the police without counsel present, and was never informed of his right to remain silent.¹⁰¹ On appeal, the United States Supreme Court, avoiding the constitutional issues, found the statute allowing waiver of jurisdiction after a "full

87. *Id.* at 544.

88. *Id.* at 543.

89. *Id.* at 544.

90. *Id.*

91. *Kent v. United States*, 383 U.S. 541, 545 (1966).

92. *Id.*

93. *Id.* at 546.

94. *Id.*

95. *Id.*

96. *Kent*, 383 U.S. at 546.

97. *Id.* at 548. The Juvenile Court Act, which governed waiver, merely stated there needed to be a "full investigation." *Id.* at 547. No standards were set out in the statute to govern the Juvenile Court's ultimate decision regarding waiver. *Id.*

98. *Id.* at 548.

99. *Kent*, 383 U.S. at 549.

100. *Id.* at 551.

101. *Id.* The attorney also argued that Kent's parents were not notified when he was being interrogated and that he had been unlawfully fingerprinted. *Id.* The conviction was affirmed and Kent appealed to the United States Supreme Court. *Id.*

investigation” could lead to arbitrary determinations, thereby reversing the decision.¹⁰² According to the Justices, this is a “critically important” question not capable of fair resolution without the right to a hearing and to effective assistance of counsel.¹⁰³ Thus, *Kent* began the erosion of the State’s *parens patriae* role in juvenile courts.

The Court, construing the Juvenile Court Act in *Kent* to be “rooted in social welfare philosophy,”¹⁰⁴ explained that juvenile proceedings primarily focus on the needs of the child and society rather than on adjudicating criminal conduct.¹⁰⁵ However, despite the State’s continuing *parens patriae* role, this doctrine is “not an invitation to procedural arbitrariness.”¹⁰⁶ Consequently, the Justices reversed *Kent*’s conviction, stating that a waiver hearing, although not required to conform to all the requirements of a criminal trial, “must measure up to the essentials of due process and fair treatment.”¹⁰⁷ The *Kent* Court, unwilling to further expand the procedural protections for a minor being tried in juvenile court, took that leap only one year later in the case of *In re Gault*.

In *In re Gault*, a fifteen-year-old was arrested on June 8, 1964.¹⁰⁸ Gerald Gault was brought to a detention facility without his parents having been notified.¹⁰⁹ After learning of the situation through his brother, his mother went to the institution and spoke to a deputy probation officer.¹¹⁰ He told her why her son was there¹¹¹ and said a hearing was scheduled for the next day.¹¹² The deputy filed a petition for the hearing, and although the parents were verbally informed of the hearing, the deputy never officially served them.¹¹³ The petition was unsupported by sufficient facts indicating the crime Gault allegedly committed.¹¹⁴ It merely stated that Gault was a “delin-

102. *Kent*, 383 U.S. at 552, 553.

103. *Id.* at 553–554; *see also* *Black v. United States*, 355 F.2d 104, 105 (1965) (holding that the assistance of counsel in the “critically important” waiver determination is vital to the just determination of juvenile court proceedings).

104. *Kent v. United States*, 383 U.S. 541, 554 (1966).

105. *Id.*

106. *Id.* at 555. The Court made it clear this holding was limited to instances involving waiver of juvenile court jurisdiction and did not afford minors any additional procedural due process rights when they are tried in juvenile court. *Id.* at 556.

107. *Id.* at 562 (citing *Pee v. United States*, 274 F.2d 556, 559 (1959)).

108. 387 U.S. 1, 4 (1967).

109. *Id.* at 5.

110. *Id.*

111. *Id.* at 4. Gault had been taken into custody because of a complaint by a neighbor that he and his friend phoned her making lewd and indecent remarks. *Id.*

112. *Gault*, 387 U.S. at 5. It is not clear what type of hearing this was.

113. *Id.*

114. *Id.*

quent," requested a hearing for a judicial order reflecting the same, and that Gault needed the court's protection.¹¹⁵ Additionally, it requested a judicial order be issued regarding Gault's custody and care.¹¹⁶

The court conducted the hearing the next day.¹¹⁷ However, the hearing was deficient in the following ways: 1) the victim was not present; 2) Gault lacked counsel; and 3) there was neither sworn testimony nor a record.¹¹⁸ During this hearing, the judge questioned Gault about his alleged criminal act.¹¹⁹ Gault gave conflicting testimony regarding certain admissions that he made to a probation officer.¹²⁰ After the hearing, Gault returned to the detention center and then was sent home three days later with no explanation about why he had been detained or why he was released.¹²¹ The same day, Mrs. Gault received a note from one of the probation officers, which stated that the "judge has set Monday June 15, 1964 at 11:00 a.m. as the date and time for further hearings on Gerald's delinquency."¹²²

Gault, his mother and father, and the two probation officers involved, attended the proceeding.¹²³ Again, Gault lacked counsel, with no offer made to provide counsel.¹²⁴ Questions posed by the judge led to certain admissions by Gault regarding the charged crime.¹²⁵ As a result of the victim's continued absence, Gault did not have an opportunity to cross-exam.¹²⁶ Although one of the probation officers prepared a report of the proceeding, Gault and his parents failed to receive a copy.¹²⁷ Following a finding of delinquency, the judge sentenced Gault to a State Industrial School until he reached the age of twenty-one.¹²⁸

Gault filed a writ of habeas corpus with the Supreme Court of Arizona.¹²⁹ The hearing, however, was in the superior court.¹³⁰ It focused on a substantial and vigorous cross-examination of the trial judge who committed

115. *Id.*

116. *Id.*

117. *Gault*, 387 U.S. at 5.

118. *Id.*

119. *Id.* at 6.

120. *Id.*

121. *Id.*

122. *Gault*, 387 U.S. at 6.

123. *Id.* at 7.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Gault*, 387 U.S. at 7.

128. *Id.* at 7-8.

129. *Id.* at 8.

130. *Id.* The facts do not indicate why the hearing was in the Superior Court.

Gault.¹³¹ The judge's position was that confinement until Gault reached the age of majority was appropriate under the Arizona Code.¹³² When the superior court agreed and dismissed the writ, Gault sought review in the Supreme Court of Arizona.¹³³

Gault argued the Juvenile Code was invalid on its face because it ran contrary to the Due Process Clause of the Fourteenth Amendment.¹³⁴ He contended that fundamental procedural rights were denied him at the trial court level.¹³⁵ Those rights included: 1) notice of the charges; 2) lack of counsel; 3) the lack of the opportunity to confront and cross-examine his accuser; 4) the privilege against self-incrimination; and 5) appellate review.¹³⁶

The Supreme Court of Arizona concluded that due process is "requisite to the constitutional validity of proceedings in which a court reaches the conclusion that a juvenile has been at fault, has engaged in conduct prohibited by law, or has otherwise misbehaved with the consequence that he is committed to an institution in which his freedom is curtailed."¹³⁷ However, the holding was limited to determinations of delinquency resulting in incarceration.¹³⁸

Justice Fortas, writing for the majority, expanded on the meaning of acting as *parens patriae* over a child.¹³⁹ Justification for depriving juveniles of their liberty without providing the procedural protections afforded to adults arose out of the civil rather than criminal nature of the proceedings.¹⁴⁰ A minor did not have a "right to liberty but to custody."¹⁴¹ He had to listen to his parents and go to school.¹⁴² Thus it followed that a parent's failure, which results in a delinquent child, calls for state intervention.¹⁴³ Accord-

131. *Id.*

132. *Gault*, 387 U.S. at 8-9.

133. *Id.* at 9.

134. *Id.* at 9-10.

135. *Id.*

136. *Id.* at 9.

137. *Gault*, 387 U.S. at 12. Notwithstanding this decision by the Supreme Court of Arizona, Gault's writ of habeas corpus was dismissed. *Id.*; see also *In re W.*, 19 N.Y.2d 55 (1966) (holding that it is unconstitutional to admit a juvenile's involuntary confession); *In re State of Interests of Carlo*, 225 A.2d 110 (N.J. 1966) (holding that prior to the admission of a juvenile's confession, fundamental fairness element of due process must first be met).

138. *In re Gault*, 387 U.S. 1, 12 (1967).

139. *Id.* at 17.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Gault*, 387 U.S. at 17.

ingly, a child was provided custody and not deprived of any rights.¹⁴⁴ Nevertheless, the Court noted, “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure, and Due process of law is the primary and indispensable foundation of individual freedom.”¹⁴⁵ Furthermore, relaxed procedures, busy calendars, and “high-handed” methods often result in a deprivation of the fundamental rights for juveniles.¹⁴⁶ Referring to the fundamental fairness rationale in *Kent*, the Court found that the same principles of due process apply in a delinquency adjudicatory setting.¹⁴⁷ Therefore, it would be astonishing not to require procedural regularity and the exercise of caution implied in the term due process.¹⁴⁸ Additionally, “[u]nder the United States Constitution, the condition of being a boy does not justify a Kangaroo court.”¹⁴⁹ Thus, the Supreme Court found that *Gault* was the victim of multiple constitutional violations.¹⁵⁰

B. Notice

Due process requires sufficient notice to allow a reasonable opportunity for preparation.¹⁵¹ More specifically, the alleged misconduct must be “set forth . . . with particularity.”¹⁵² The notification of the June 15 hearing merely stated there were to be further delinquency proceedings, but failed to describe the nature of the charges and failed to provide any supporting

144. *Id.*

145. *Id.* at 18, 20.

146. *Id.* at 19.

147. *Id.* at 30–31.

148. *Id.* at 27–28.

149. *Gault*, 387 U.S. at 28; *see also* *Shepherd*, *supra* note 50, at 24.

150. *In re Gault*, 387 U.S. 1, 31–57 (1967). Although it was raised on appeal, the court did not rule on whether a juvenile was entitled to a right of appeal from a finding of delinquency. *Id.* But *see* § 985.234 (stating that an appeal from a juvenile court order may be taken to the appropriate district court of appeal by any child and any parent or legal guardian or custodian of the child).

151. *Gault*, 387 U.S. at 33.

152. *Id.*; *see also* FLA. R. JUV. P. 8.010(a) (stating that no detention order shall be entered without a hearing during which all the parties shall have an opportunity to be heard); FLA. R. JUV. P. 8.010(d) (requiring the intake officer to make a diligent effort, in the most expeditious manner, to notify a parent or custodian of a child to inform them of the time and place of a detention hearing); FLA. R. JUV. P. 8.013 (providing that a detention petition order shall state the reasons why the child is in custody and should to be detained); FLA. R. JUV. P. 8.035 (mandating juvenile delinquency petitions allege facts showing the child to have committed a delinquent act).

facts.¹⁵³ Thus, the notice was insufficient to provide Gault an opportunity to reasonably prepare a defense.¹⁵⁴

C. Right to Counsel

Since *Gault*, a child has the same right to counsel in a juvenile hearing as in an adult criminal setting because a delinquency adjudication that results in loss of liberty is equivalent to punishment when convicted in felony prosecutions.¹⁵⁵ The assistance of counsel is essential for carefully examining the facts of his case, as well as determining, preparing and presenting a defense.¹⁵⁶ The possibility of incarceration is too severe a penalty to not provide a child with legal representation.¹⁵⁷ Consequently, the Due Process Clause of the Fourteenth Amendment demands, in those situations where delinquency may result in incarceration, that the child and parents be notified of the right to counsel and to the appointment of a lawyer if indigent.¹⁵⁸

D. Self-incrimination

Gault asserted that the privilege against self-incrimination was unavailable to him.¹⁵⁹ No one advised him that making certain admissions could result in a loss of his liberty.¹⁶⁰ The Court concluded that the privilege against self-incrimination goes the heart of procedural safeguards necessary to guarantee that "admissions or confessions are reasonably trustworthy."¹⁶¹ Providing the privilege against self-incrimination to adults but not children creates a non-existent exception to the Fifth and Fourteenth Amendments, in essence excluding minors from its protection.¹⁶²

153. *Gault*, 387 U.S. at 33.

154. *Id.*

155. *In re Gault*, 387 U.S. 1, 36 (1967). *But see* *Florida v. T.G.*, 800 So. 2d 204, 210 (Fla. 2001) (holding that although the inquiry into waiver of counsel in juvenile proceedings should be equal to that afforded to adults, courts should be even more cautious when accepting a waiver of counsel from children).

156. *Gault*, 387 U.S. at 36.

157. *Id.*; *see supra* note 10.

158. *Gault*, 387 U.S. at 41.

159. *Id.* at 42.

160. *Id.* at 43-44.

161. *Id.* at 47.

162. *Id.*

E. Confrontation and Cross-Examination

Gault also argued that denying his right to confront and cross-examine the witnesses violated his constitutional rights.¹⁶³ Moreover, it was not enough that sworn testimony was taken of those involved in the juvenile proceedings.¹⁶⁴ Absent a finding of a valid confession, confrontation and sworn testimony by witnesses accessible for cross-examination are indispensable for a finding of delinquency.¹⁶⁵

IX. THE SIGNIFICANCE OF COMPETENCY TO STAND TRIAL

The rising number of children committing violent offenses has been the catalyst for a change in the way states view competency of a juvenile.¹⁶⁶ Moreover, as juvenile proceedings rapidly approach the similarity of adult criminal proceedings, the argument that a child must be competent to stand trial becomes stronger.¹⁶⁷ For example, Florida has amended its statutes regarding competency to stand trial in juvenile cases to almost mirror the adult criminal code.¹⁶⁸ The resemblance between the two systems yields a height-

163. *Gault*, 387 U.S. at 42

164. *In re Gault*, 387 U.S. 1, 56 (1967).

165. *Id.*

166. GRISIO I, *supra* note 8, at 86; *see also* Steinberg, *supra* note 84. Steinberg discusses more than a century of change in the juvenile justice system from rehabilitation to punishment. *Id.* The cause for this change seems to be the dramatic increase in homicides and violent crimes committed by children. *Id.* Steinberg argues this is due to the increase in the availability of guns. *Id.*

167. Judy L. Estren, *Adjudicatory Hearings in Delinquency Cases*, FLA. JUV. L. & PRAC. § 7.2 (2003) (pointing out that the *Florida Rules of Juvenile Procedure* have removed practically all distinctions between adult criminal trials and adjudicatory hearings). The juvenile rules mimic those of the *Florida Rules of Criminal Procedure*. *Id.* Further, an adjudicatory hearing is virtually the same, procedurally, as an adult non-jury trial. *Id.*; *see also* Jennifer A. Parker, *Role of the Lawyer in Delinquency Cases*, FLA. JUV. L. & PRAC. § 2.1 (2003) (arguing that the juvenile justice system is moving towards protection of the public rather than rehabilitation); Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479 (1995) (arguing that juvenile justice systems have increasingly promoted punitive goals); FLA. STAT. § 985.01 (2003) (stating that the purpose of the delinquency chapter is to “ensure the protection of society” through “the most appropriate control, discipline, punishment and treatment while taking into account the need to protect the public safety”). *Accord* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (upholding the constitutionality of the lack of a right to a jury trial involving a juvenile). *But see* § 985.228(2) (mandating that adjudicatory hearings be held without a jury); FLA. R. JUV. P. 8.110(c) (stating that an adjudicatory hearing shall be conducted by a judge without a jury).

168. Grisso III, *supra* note 83, at 7; *see also* § 985.223; FLA. R. CRIM. P. 3.211 (explaining competency to proceed as it relates to adults).

ened interest in examining a youth's competency. Although *In re Gault* did not explicitly mandate juveniles be competent to stand trial, that requirement can be logically inferred from the right to counsel mandated by the Court.¹⁶⁹ A right to counsel would be meaningless if an incompetent juvenile was compelled to stand trial.¹⁷⁰

A determination of an adolescent's competency is a complex question based on evaluations by mental health experts.¹⁷¹ Historically, incompetence was a tool used by adult defendants with mental illnesses.¹⁷² In addition to mental incompetence, children have the additional problem of developmental immaturity.¹⁷³ In other words, a minor could be completely free from any mental disorder, yet, based on his age and immaturity, be unable to proceed to trial.¹⁷⁴ Conversely, a child could be mature, but lack the requisite mental capacity.¹⁷⁵ Therefore, it is imperative to analyze an adolescent's cognitive and psychosocial capacities to understand how they relate to his competence to stand trial.¹⁷⁶

A 2003 MacArthur Foundation Research Network Study ("MacArthur") revealed astonishing results involving a juvenile's competence to proceed to trial.¹⁷⁷ MacArthur defined adolescence as between ten and seventeen years old.¹⁷⁸ During those seven years, developmental changes are rapid and ex-

169. See Grisso III, *supra* note 83.

170. *Id.* at 7; see also *In re S.H.*, 469 S.E.2d 810 (Ga. Ct. App. 1996) (noting that the right to legal counsel would be meaningless if a juvenile defendant was not capable of exercising it and participating in his own defense).

171. § 985.223(b) (stating that all determinations of competency shall be made at a hearing based on evaluations of not less than two nor more than three experts appointed by the court).

172. Steinberg, *supra* note 84.

173. *Id.*

174. GRISSE I, *supra* note 8, at 86; see also *In re Causy*, 363 So. 2d 472, 476 (La. 1978) (stating that a child's "tender years" may form a basis for a finding of incompetency); Steinberg, *supra* note 84, at 21.

175. Steinberg, *supra* note 84, at 22. See generally § 984.223(f) (applying only one set of factors when evaluating juvenile incompetency regardless of the child's mental status or age). Experts appointed to evaluate a child must consider whether the child can: 1) appreciate the charges or allegations against him; 2) appreciate the range of possible penalties that could be imposed by the judge; 3) understand the "adversarial nature of the legal process;" 4) reveal important facts to defense counsel; 5) behave accordingly in the courtroom; and 6) testify relevantly. § 984.223(f).

176. Steinberg, *supra* note 84, at 22.

177. *Id.* at 21. Commentators are already using this study to support their legal arguments relating to juveniles and competency. Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, WASH. U. J.L. POL'Y 327, 353 (2004).

178. Steinberg, *supra* note 84, at 22.

treme.¹⁷⁹ These researchers sought to contrast cognitive and psychosocial differences with those of young adults, ages eighteen to twenty-four.¹⁸⁰ Of the 1,400 people tested, half were either in jail or a juvenile detention facility, while the rest were from the general public.¹⁸¹

Almost one-third of the eleven to thirteen-year olds and approximately one-fifth of the fourteen to fifteen-year olds were deemed not competent to stand trial.¹⁸² Not surprisingly, many of the younger adolescents could neither understand the judicial process nor the judge's role.¹⁸³ Few could discern differences between prosecutors and defense attorneys.¹⁸⁴ Even when their rights were explained to them, they could not grasp them.¹⁸⁵ Many of the children fifteen and younger were incapable of putting facts together and drawing logical conclusions.¹⁸⁶ Their ability to imagine future consequences stemming from their actions was considerably less than adults.¹⁸⁷ Thirty percent of eleven to thirteen-year olds performed at the level of mentally ill adults regarding trial appreciation and interpreting important information.¹⁸⁸ Juveniles under the age of thirteen were least likely to comprehend risks or consider the long-term consequences of their decisions.¹⁸⁹ Similar to those under thirteen, nineteen percent of fourteen to fifteen-year olds also performed at the level of mentally ill adults in relation to trial appreciation and interpreting vital information.¹⁹⁰ Predictably, adolescents fifteen and younger were far more likely to just adhere to an authority figure's request than older adolescents and younger adults.¹⁹¹ Overall, adolescents were more eager than adults to "come clean," particularly when promised the confession will result in a prize like going home.¹⁹² Most significant is that these find-

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 23.

183. Steinberg, *supra* note 84, at 23; *see also* Grisso III, *supra* note 83, at 7 (suggesting that current research indicates that thirteen to fourteen year olds have questionable ability to deal with abstract legal concepts that a majority of adults can).

184. Steinberg, *supra* note 84, at 23.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Steinberg, *supra* note 84, at 23.

190. *Id.*

191. *Id.*

192. *Id.*

ings were the same regardless of the youth's previous contact with the judicial system.¹⁹³

This study demonstrates that a child's intelligence level can have a strong impact on whether a juvenile will be deemed competent to proceed to trial.¹⁹⁴ A disproportionate number of children in the justice system have below average intelligence and, of course, these were "most likely to lack the abilities related to competence."¹⁹⁵ Additionally, of the incarcerated minors fifteen years old and younger, two-thirds had an IQ below eighty-nine.¹⁹⁶

The MacArthur study also suggests the necessity for social policy and legislative change.¹⁹⁷ Just as important is that it supports imposing a heavy burden on defense attorneys to address their juvenile clients' competency issues.¹⁹⁸ In fact, Patricia Lee, a member of the MacArthur Research Network, warns that "competency is the first question defense attorneys have to confront in these cases."¹⁹⁹

X. INEFFECTIVE ASSISTANCE OF COUNSEL: THE BURDEN ON THE ATTORNEY

A juvenile charged with a crime faces a frightening experience and is in a very difficult position.²⁰⁰ Being arrested in and of itself is a traumatizing experience for a child.²⁰¹ The decisions he has to make will affect the rest of his life.²⁰² An attorney must know his juvenile client's level of development to ensure he is able to appreciate the choices he will have to make and to aid

193. *Id.*; see also Grisso III, *supra* note 83, at 8 (stating that research indicates that the "mere fact that a youth is a repeat offender is not a reliable indicator of the youth's understanding of the trial process or his rights"). This is particularly interesting in light of the fact that the *Tate* court considered this as a factor in reversing his conviction. *Tate v. State*, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003).

194. Steinberg, *supra* note 84, at 23.

195. *Id.*

196. *Id.* at 24; see AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 35.

197. Steinberg, *supra* note 84, at 24.

198. *Id.*

199. *Id.*; see also Grisso II, *supra* note 55, at 77 (noting that most reported opinions involving adjudicative competency revolved around the lawyer's failure to seek competency evaluations).

200. Steinberg, *supra* note 84, at 24.

201. *Id.*

202. *Id.* Compounding this are the cognitive defects and learning disabilities from which the child may suffer. Unfortunately, the minor may be in a situation where he has been abandoned by his family. *Id.* In fact, Lee points to pressures children face when placed in custody, such as: 1) sitting in a holding cell for hours; 2) waiver of important legal rights; 3) plea offers from the prosecutors; and 4) plea offers from the judge rushing through their case. *Id.*

in his defense.²⁰³ Thus, failure to explore competency may constitute ineffective assistance of counsel.²⁰⁴ To establish ineffective assistance of counsel the following must be proved: “1) counsel’s performance was deficient, in that his representation fell below an objective standard of reasonableness; and 2) the deficient performance prejudiced the defense depriving the defendant of a fair trial, in that there is a reasonable probability that but for counsel’s unprofessional errors, the result would have been different.”²⁰⁵ A reasonable probability is “a probability sufficient to undermine confidence in the outcome.”²⁰⁶

A finding of incompetency precludes a conviction, so a failure to investigate a defendant’s competency is ineffective assistance of counsel.²⁰⁷ In *Broomfield v. State*, the defendant, James Broomfield, pled guilty to robbery of a firearm and grand theft of a motor vehicle.²⁰⁸ One year later he filed a motion for post-conviction relief alleging he was incompetent when he entered his plea.²⁰⁹ His first trial attorney, Kenneth Garber, testified that he had filed a motion in the trial court seeking a competency evaluation.²¹⁰ The psychologist who evaluated Broomfield reported that he was “actively psychotic” and incompetent to stand trial, but that his competency could have been restored with suitable hospitalization and medication.²¹¹

When a conflict of interest forced Garber to withdraw, Frank Porter was appointed to represent Broomfield.²¹² The psychologist’s report was given to Porter.²¹³ By the time of the post-conviction hearing, Porter could not remember whether he discussed the report with Broomfield, but he did say that

203. Steinberg, *supra* note 84, at 24. Lee argues, “the burden is on defense attorneys to make certain their clients understand the situation and the choices they must make.” *Id.*

204. *Broomfield v. Florida*, 788 So. 2d 1043, 1044–45 (Fla. 2d Dist. Ct. App. 2001).

205. *Strickland v. Washington*, 466 U.S. 668, 669 (1984); *see also Jones v. Florida*, 845 So. 2d 55, 65 (Fla. 2003). *But see Davis v. Florida*, No. SC02-1580, SC02-2472, 2003 WL 22722316, at *3 (Fla. Nov. 20, 2003) (holding that strategic decisions made by trial counsel do not constitute ineffective assistance of counsel).

206. *Jones*, 845 So. 2d at 55 (citing *Ragsdale v. Florida*, 798 So. 2d 713, 715 (Fla. 2001)).

207. *Broomfield*, 788 So. 2d at 1043, 1044–45 (Fla. 2d Dist. Ct. App. 2001) (citing *Jones v. Florida*, 740 So. 2d 520, 522 (Fla. 1999)).

208. *Id.* at 1043. The defendant was currently serving a sentence for a federal crime. The plea for both of the felonies was to run concurrently with the federal sentence. *Id.*

209. *Id.* The defendant did not file a direct appeal from his sentence. *Id.* Thus, the facts of the case were developed at the post-conviction hearing. *Id.*

210. *Broomfield v. Florida*, 788 So. 2d 1043, 1044 (Fla. 2d Dist. Ct. App. 2001).

211. *Id.* The facts do not explicitly indicate whether Broomfield had at one time been competent, but the psychologist’s report would indicate that because there was a chance of restoration, he may have been competent in the past. *Id.*

212. *Id.*

213. *Id.*

he did not have reservations about his client's competency to enter into the plea.²¹⁴ Notably, however, when asked at the post-conviction hearing whether he would have permitted Broomfield to enter a plea without a second report, Garber responded, "probably not."²¹⁵ In addition to Porter's own observations at the plea hearing, a letter Broomfield sent influenced his decision not to raise competency.²¹⁶ In the letter, Broomfield wrote that he would be entering his pleas in state court and questioned how his state sentence would be imposed given his current federal sentence.²¹⁷ It was unclear whether Porter ever spoke to Broomfield prior to the plea hearing.²¹⁸ Thus, testimony by Broomfield was imperative for the trial court's resolution of whether Porter was ineffective.

Broomfield's testimony at the post-conviction hearing related to Porter's deficient representation.²¹⁹ He stated that he had not been given the psychologist evaluation, and if he had been furnished the report, he would not have entered his pleas.²²⁰ Moreover, Broomfield had been hospitalized in federal prison and was taking medication.²²¹ The trial court found that Broomfield was competent at the time he entered his pleas and that his counsel was not ineffective.²²²

On appeal, the Second District Court of Appeal concluded that Porter was ineffective based on his failure to investigate Broomfield's competency at the time he entered his pleas.²²³ The psychologist's report that Porter disregarded was sufficient to support an incompetency defense.²²⁴ Moreover,

214. *Broomfield*, 788 So. 2d at 1044.

215. *Id.*; see FLA. R. CRIM. P. 3.210(b) (explaining that upon motion by the court, counsel for the defendant or the state concerning a defendant's competency, the court shall order the defendant to be examined by no more than three, nor less than two experts).

216. *Broomfield*, 788 So. 2d at 1044.

217. *Id.*

218. *Id.*

219. *Broomfield v. Florida*, 788 So. 2d 1043, 1044 (Fla. 2d Dist. Ct. App. 2001).

220. *Id.*

221. *Id.* at 1044. Broomfield also testified that when he entered his plea in federal court, that judge found him competent. *Id.*

222. *Id.*

223. *Id.* at 1045; see also *Powell v. Florida*, 464 So. 2d 1319, 1319 (Fla. 1st Dist. Ct. App. 1985) (recognizing that a failure to raise a defendant's incompetency can be grounds for ineffective assistance of counsel); *Lilley v. Florida*, 667 So. 2d 887, 887 (Fla. 2d Dist. Ct. App. 1996) (stating that failing to inform the court of a defendant's mental illness and alcohol problems could rise to the level of ineffective assistance of counsel); *Saunders v. Florida*, 704 So. 2d 224 (Fla. 4th Dist. Ct. App. 1998) (reversing a defendant's conviction due to absence of record refuting claim that counsel was ineffective for failure to investigate defendant's competency).

224. *Broomfield*, 788 So. 2d at 1045.

Porter's reliance on the letter Broomfield sent to him was misplaced.²²⁵ The court also questioned Porter's personal assessment of Broomfield's competency when the record did not indicate whether they ever spoke prior to the plea hearing.²²⁶ An attorney's obligation to find out information about his client, especially when certain facts become known that should trigger further inquiry, is imperative to effective representation.²²⁷

A lack of client consultation can rise to the level of ineffective assistance of counsel if the defendant can show prejudice resulted.²²⁸ In *Jackson v. State*, for example, the defendant alleged that his attorney was ineffective because he only visited him twice while in prison.²²⁹ The Fifth District Court of Appeal held that the defendant must also show how he was prejudiced by the failed communication.²³⁰ The defendants in *Jackson* and *Broomfield* were adults, but the claim of ineffective assistance of counsel can also be raised by a youth being tried in juvenile court.²³¹

Although ineffective assistance of counsel stemming from the failure to investigate a youth's competency in juvenile court has not been addressed in Florida, based on *Kent* and *Gault*, minors should have the same rights as the adult defendants in *Jackson* and *Broomfield*. A finding of incompetency will bar adjudication of an adolescent in juvenile court just as it prohibits conviction of an adult or a juvenile being charged as one.²³² Thus, based on the

225. *Broomfield v. Florida*, 788 So. 2d 1043, 1045 (Fla. 2d Dist. Ct. App. 2001). The court found that the letter Broomfield sent Porter could not rebut the findings of the psychologist's report. *Id.*

226. *Id.*

227. *Jackson v. Florida*, 801 So. 2d 1024, 1025 n.1 (Fla. 5th Dist. Ct. App. 2001).

228. *Id.* at 1025.

229. *Id.*

230. *Id.*; see also *Cook v. Florida*, 792 So. 2d 1197, 1202 (Fla. 2001) (holding that failing to investigate the defendant's family history and mental health mitigators could be ineffective assistance of counsel); *McCann v. Florida*, 854 So. 2d 788, 790-91 (Fla. 2d Dist. Ct. App. 2003) (failing to investigate and prepare a meaningful defense may not be a strategic decision but could rise to the level of ineffective assistance of counsel). Wyoming has held the failure of trial counsel to interview a defendant is ineffective assistance of counsel when the attorney could have realized through a consultation that inculpatory statements were made by his client which would have lead to the filing of a motion to suppress based on a Miranda violation. *LDO v. Wyoming*, 858 P.2d 553, 556-57 (Wyo. 1993).

231. *P.M.W. v. Florida*, 678 So. 2d 484, 485 (Fla. 5th Dist. Ct. App. 1996) (holding that juvenile trial counsel's failure to file an initial appeal brief constituted ineffective assistance of counsel).

232. § 985.223(5) (a)-(c) (mandating that a child found to be incompetent shall remain under the juvenile court's jurisdiction for two years following the date of the order of incompetency). If the court determines that, at any time, a youth will never become competent to proceed, the court may dismiss the petition for delinquency. *Id.* Furthermore, at the end of

rationale of *Broomfield*, failing to investigate a youth's competency in juvenile court can lead to a claim of ineffective assistance of counsel.²³³ According to a Senior Attorney of the Broward County Public Defender Juvenile Division, an influx of ineffective assistance of counsel allegations by juveniles because of a failure to explore the youth's competency will be a ramification of the *Tate* opinion. "After *Tate*, more juveniles will be appealing based on ineffective assistance of counsel for a failure to inquire into their competency."²³⁴ Thus, incompetency to proceed must be the first issue an attorney addresses when his client is charged with a serious crime.²³⁵

XI. COMPETENCY TO STAND TRIAL: THE BURDEN ON THE JUDGE

While the lawyer bears the burden of filing a motion for competency, the judge carries the responsibility of ruling on the defendant's competence.²³⁶ In addition, when neither of the lawyers raise the issue of competency, a judge may also have the obligation to order a competency hearing.²³⁷

the two year period, if there is no evidence that a child will retain competency within one year, the court must dismiss the petition. *Id.*

233. Kentucky recognizes that children are often the victims of informal juvenile judicial process. Catherine Browning Hendrickson, *The Legal Practitioner's Guide to RCR 11.42 for Juvenile Defendants*, 5-SPG KY. CHILD. RTS. J. 16, 24 (1997). As a result, counsel and adolescent clients meet for the first time shortly prior to arraignment or trial. *Id.* Thus, the youth may have a claim of ineffective assistance of counsel so that disposition may be set aside. *Id.* But see *A.F.E. v. Florida*, 853 So. 2d 1091 (Fla. 1st Dist. Ct. App. 2003) (stating that collateral relief on the issue of ineffective assistance of counsel is not practical for a juvenile because the sentence imposed by the court may conclude prior to the granting of appellate relief).

234. Interview with Melinda Blostein, Senior Attorney, Broward County Public Defender Juvenile Division, in Ft. Lauderdale, Fla. (Mar. 2, 2004).

235. See Diana Marrero, *Miami-Dade 8th Grader Charged with Murdering Classmate in School*, SUN-SENTINEL (Miami-Dade), Feb. 19, 2004, at A1. A juvenile was charged as an adult for first-degree murder. *Id.* Steve Drizin, a law professor at Northwestern University, stated that "one of the first issues that will have to be addressed is the boy's competency to stand trial in adult court." *Id.*

236. Steinberg, *supra* note 84, at 25.

237. FLA. R. CRIM. P. 3.210(b) (stating that a court shall, on its own motion, order a competency hearing when the court has reasonable ground to believe the defendant is not competent to proceed); see also FLA. R. JUV. P. 8.095(2) (providing that during any time prior to or during the adjudicatory hearing the court has reasonable grounds to believe the child may be incompetent, the court on its own motion shall immediately stay the proceedings and order a hearing to determine the child's competency to proceed); Mike Folks, *Judge Rejects Teen's Plea, Sets Competency Hearing*, SUN-SENTINEL (Ft. Lauderdale), Mar. 1, 1995, at B2 (stating a fourteen-year-old was charged as an adult with murder whereafter the judge did not accept his plea deal when she learned of his past psychiatric treatment and instead ordered a competency hearing).

A judge's failure to order a hearing on the issue of a defendant's competency can violate his constitutional right to a fair trial.²³⁸

In *Pate v. Robinson*, after admitting he shot his wife, the adult defendant was convicted of murder.²³⁹ The defense attorney never filed a motion for competency, and the court failed to order one on its own.²⁴⁰ As a result, one issue was whether the defendant was competent to stand trial.²⁴¹ The State argued the trial judge was not required to order a competency hearing *sua sponte*.²⁴² After examining the extensive evidence of defendant's troubling behavior, the United States Supreme Court disagreed.²⁴³

Each witness for the defense testified that the defendant exhibited erratic behavior and was insane.²⁴⁴ His mother testified that the defendant had always acted a little peculiarly after a brick fell from the third floor and hit him on the head when he was seven or eight years old.²⁴⁵ Years later, while the defendant was visiting his mother from the Army and speaking with a guest, he jumped up and kicked a hole in the bar.²⁴⁶ When asked what was wrong, the defendant just paced back and forth with his hands in his pockets.²⁴⁷ At other times he would not speak or answer questions and would have an odd glare in his eyes.²⁴⁸ He would imagine people were "after him" and saw people who were not there.²⁴⁹ His behavior was described as extremely violent and erratic.²⁵⁰ His grandfather testified to the defendant's forgetful behavior.²⁵¹ Testimony also revealed he was suicidal.²⁵²

238. *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

239. *Id.* at 376.

240. *Id.* at 376–377.

241. *Id.* at 376. Another issue was whether Pate was insane at the time he committed the crime. *Id.*

242. *Pate*, 383 U.S. at 378.

243. *Id.*

244. *Id.* at 378, 383.

245. *Id.* at 378.

246. *Id.* at 378–79.

247. *Pate*, 383 U.S. at 379.

248. *Id.* Testimony by the defendant's grandfather indicated that when the defendant worked for him he would have a strange dazed look in his eyes. *Id.* at 380.

249. *Id.* at 379. Testimony indicated that while visiting his aunt he was seeing a person who "was going to shoot him." *Id.* During this time his mother testified he was foaming at the mouth. *Pate*, 383 U.S. at 379.

250. *Id.* at 379, 380. On the way to a hospital, he tried to leap from a policeman's car, and while at the hospital he had to be strapped into a chair. *Id.* at 379.

251. *Id.* at 380. The defendant would leave and come back from work without ever realizing he left. *Id.* at 380–381.

252. *Pate*, 383 U.S. at 381. The defendant attempted to kill himself by a gunshot wound to the head, and another unsuccessful drowning attempt. *Id.* This came on the heels of shooting and killing his eighteen month old son. *Id.*

After serving time for the murder of his son, the defendant beat up his mother's brother-in-law.²⁵³ The mother sought an arrest warrant explaining to the police that he was out of his mind.²⁵⁴ In addition, she attempted to have him arrested for continually fighting on the streets.²⁵⁵ The defendant eventually murdered his wife while she worked.²⁵⁶ The State offered only one piece of rebuttal evidence to the testimony that the defendant was not competent.²⁵⁷

William H. Haines, the Director of the Behavior Clinic of Criminal Court of Cook County, had examined the defendant two or three months prior to trial.²⁵⁸ He was not, however, present to testify at trial.²⁵⁹ Nevertheless, the State introduced his opinion that the defendant "knew the nature of the charges against him and was able to cooperate with counsel when he examined him before trial."²⁶⁰

The United States Supreme Court concluded that the defendant was constitutionally entitled to a hearing to determine his competency; the trial judge's failure to make that inquiry, *sua sponte*, denied him of his right to a fair trial.²⁶¹

A judge's obligation to order a competency hearing is also applicable in juvenile court when there are reasonable grounds to believe that a child may

253. *Id.*

254. *Id.*

255. *Pate*, 383 U.S. at 381–382.

256. *Id.* at 382. Testimony indicated he came into the restaurant where she worked, stared at her for a minute, and eventually shot her once or twice. *Id.* He never said a word the entire time he was in the store. *Id.* After the killing, the defendant went to his friend's house who called the police. *Id.* The defendant was present when the police arrived but he said he did not know anything about a murder when asked by the police. *Pate*, 383 U.S. at 382–383.

257. *Id.* at 383.

258. *Id.*

259. *Id.* The facts do not indicate why Dr. Haines was not present to testify at trial.

260. *Id.*

261. *Pate*, 383 U.S. at 385; *see also* *Hill v. Wainwright*, 473 So. 2d 1253, 1259 (Fla. 1985). The trial court failed to address the issue of whether the evidence at trial mandated a competency hearing for the defendant. *Hill*, 473 So. 2d at 1259. Testimony indicated that the defendant had an IQ of sixty-six, had a history of grand mal epileptic seizures, mental retardation with communication issues, and accepting guilt without considering the facts. *Id.* at 1254–1256. The court, relying on the principle rationale of *Robinson*, held that the judge's failure to order a competency hearing, *sua sponte*, denied the defendant of the right to a fair trial. *Id.* at 1259. *But see* *Agan v. Florida*, 503 So. 2d 1254, 1256 (Fla. 1987). The mere fact that a defendant confesses, pleads guilty, and disregards his lawyer's advice does not raise doubt about his mental competency. *Id.* The court, on its own motion, must order a competency hearing only when there is "evidence, information, or any showing before the court that raises questions concerning the defendant's competency." *Id.* Here, this principle cannot be extended to the defendant merely because the decision he made to plead guilty was a bad one. *Id.*

be incompetent to proceed.²⁶² *W.S.L. v. State* is illustrative. A nine-year-old boy was adjudicated guilty of first-degree felony murder, sexual battery, attempted sexual battery, and aggravated battery.²⁶³ Prior to trial, the child's trial attorney filed a motion for a competency hearing.²⁶⁴ In support, he included the report of the psychologist who had examined the boy.²⁶⁵ Despite the psychologist's conclusion that the adolescent "did not have an understanding of the adversary nature of the criminal justice system and had no ability to assist his attorney in planning a defense because of his age and intellect," the trial judge denied the motion.²⁶⁶ The Second District Court of Appeal held that the psychologist's report provided reasonable grounds to believe that the juvenile "may have been incompetent."²⁶⁷ Thus, the court concluded that the trial judge erred in denying the youth's motion for a hearing to determine his competency to stand trial.²⁶⁸

Although *W.S.L.* was decided in 1985, the Juvenile Rules have not changed. When reasonable grounds exist, before or during an adjudicatory hearing, to believe a youth may be incompetent, the court "shall" immediately order a hearing to determine the adolescent's competency.²⁶⁹ On the other hand, the Florida statute relating to incompetency in a juvenile delinquency case does not mandate the judge order a competency hearing; it is discretionary.²⁷⁰ It states that when there is reason to believe, prior to or during a delinquency case, that the child may be incompetent to proceed, the court on its own motion "may" order an evaluation of the child's mental condition.²⁷¹ The statute and rule differentiate between the time before or during an adjudicatory hearing and prior to or during a delinquency case. Those two periods of time overlap and can be considered the same. For example, an adjudicatory hearing can occur at any time "during a delinquency case." Likewise, any time before or during an adjudicatory hearing is con-

262. *W.S.L. v. Florida*, 470 So. 2d 828, 830 (Fla. 2d Dist. Ct. App. 1985), *rev'd on other grounds*, 485 So. 2d 131 (Fla. 1986); *see also* FLA. R. JUV. P. 8.095(2) (providing that during any time prior to or during the adjudicatory hearing the court has reasonable grounds to believe the child may be incompetent, the court on its own motion shall immediately stay the proceedings and order a hearing to determine the child's competency to proceed).

263. *W.S.L.*, 470 So. 2d at 829.

264. *Id.* at 830.

265. *Id.*

266. *Id.*

267. *Id.*

268. *W.S.L.*, 470 So. 2d at 830. The Second District Court of Appeal relied on what was rule 8.170(a)(1) of the *Florida Juvenile Rules of Procedure* in holding that the judge was obligated to order the competency hearing. *Id.*

269. FLA. R. JUV. P. 8.095(a)(2).

270. § 985.223(1).

271. *Id.*

sidered to be “part of the delinquency case.” Because those two periods of time can be considered to be identical, the different language in the rule and in the statute can lead to confusion and unfair results. Thus, making the statute discretionary and the juvenile rule mandatory is illogical. Moreover, the rationale of *Tate, Pate, and W.S.L.* obligates the judge to order a competency hearing when there are reasonable grounds, which leads to the conclusion that the discretionary nature of the Florida statute gives a judge leeway he should not have.

XII. PROPOSAL

The evolution of juvenile competence turns on historical issues of justice and fairness.²⁷² Early intervention in a child’s development establishes a pattern that prevents delinquency in later years.²⁷³ The most important and effective programs are those that highlight family support structure, as well as those providing health care services, and others that stress parental support and education.²⁷⁴ Interceding in a troubled child’s life as soon as possible is also imperative for the prevention of recidivism.²⁷⁵ Likewise, early determination of a child’s competency to stand trial will help to prevent a violation of his procedural due process rights. The findings of the MacArthur study illustrate that, on average, children fifteen and younger are less likely to possess essential characteristics necessary to be competent to stand trial than those sixteen and older.²⁷⁶ Thus, a mandatory competency hearing for children under sixteen, either being tried in juvenile court or in adult court, would, at the very least, address the issue of competency to stand trial.

Intervening as early as possible to reduce the potential for recidivism is just as important as the court’s obligation to make an initial determination of a child’s competency prior to proceeding on a petition. The former protects the child from committing future criminal acts, and the latter guards against adjudicating or convicting an incompetent youth. Therefore, states must

272. Steinberg, *supra* note 84, at 24.

273. Gloria Danzinger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L. Q. 397, 398 (2003).

274. *Id.* at 397–98. Danzinger writes that intervening means to do so early in the adolescent’s development through pre-school education programs and through parent educational services that improve the child’s ability to prepare for school. *Id.* at 397. This, she argues, may set up patterns that prevent criminal behavior by the child when he or she grows up. *Id.* It is her position that the children who elect to participate in these programs are less likely to drop out and become delinquents. *Id.*

275. *Id.* Recidivism means that a child has multiple similar charges. BLACK’S LAW DICTIONARY 1021 (7th ed. 1999).

276. Steinberg, *supra* note 84, at 24.

require immediate obligatory hearings to determine an adolescent's competency. If a state does not require competency inquiries of a juvenile, a judge can and ought to consider competency first, says Robert Schwartz, cofounder and executive director of the Juvenile Law Center.²⁷⁷ One state does just that.²⁷⁸

Under Virginia law, a competency hearing is required when the State Attorney requests a transfer hearing, and the child, fourteen or older, is charged with what would be a felony if committed by an adult.²⁷⁹ However, this does not go far enough. A youth charged with a felony in juvenile court should also be entitled to a mandatory competency hearing.²⁸⁰ The reasons to discriminate between the two systems, adult and juvenile, have diminished with the current movement toward punishment in the juvenile system.²⁸¹ "The fact is, the juvenile justice system has become so punitive, the consequences of a juvenile adjudication have such long-term effects on kids' lives, that we have to address the competence issue."²⁸² The vital notions of procedural due process support the proposal for a mandatory competency hearing.

The *Tate* opinion provided a juvenile tried as an adult with an additional procedural safeguard at the trial court level. Irrespective of *Tate*'s trial lawyer's failure to move for competency, the judge's failure to do so violated his due process. However, that holding cannot be limited to a juvenile tried in adult court. Under *W.S.L.*, it would seem that a judge would have that same obligation in juvenile proceedings. Due process should not be limited just because the child is tried as a minor. Mandatory competency hearings for children under sixteen charged with a felony, either in juvenile or adult court, would provide important and extra protections to children who can easily fall victim to a complex and unforgiving system.

Certainly a mandatory competency hearing would be a drain on judicial and other resources. Nevertheless, the time and money spent trying a child without addressing his competency wastes judicial resources when the end result is a reversal because of a constitutional due process violation.²⁸³ In addition, the lack of a compulsory competency hearing can have adverse consequences on the child as well as undermine the integrity of the judicial system.

277. *Id.*

278. VA. CODE ANN. § 16.1-269.1(A)(3) (Michie 2004).

279. *Id.*

280. Grisso III, *supra* note 83, at 9 (explaining that youths up to mid-adolescence may need a mandatory competency hearing).

281. Steinberg, *supra* note 84, at 25.

282. *Id.*

283. *Tate v. State*, 864 So. 2d 44, 44 (Fla. 4th Dist. Ct. App. 2003).

XIII. CONCLUSION

A child is not just a shorter, more compact version of an adult.²⁸⁴ The immaturity level a youth brings with him to court is evident and must be considered in a justice system that strives “to be both effective and fair.”²⁸⁵ A lawyer cannot ignore his adolescent client’s due process rights any more than a judge cannot ignore the same. Moreover, uniformity among the Rules of Juvenile Procedure and the Florida Statutes, relating to delinquency, should uniformly require a judge to address competency, not merely give him the discretion to do so. Unfortunately, adolescents under the age of sixteen will convert from defendants to the vulnerable victims of the Criminal Justice System without the due process of a mandatory competency hearing prior to being tried.

284. Steinberg, *supra* note 84, at 25.

285. *Id.*

SARBANES-OXLEY: A PRIMER FOR PUBLIC COMPANIES, AND THEIR OFFICERS AND DIRECTORS, AND AUDIT FIRMS

ROBERT C. BRIGHTON, JR.*

On July 30, 2002, in response to widespread concern about corporate governance excesses and financial fraud, United States President, George W. Bush, signed into law the Sarbanes-Oxley Act of 2002 ("Act"),¹ a bill effecting the greatest change in United States regulation of the securities markets since the original adoption of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").

Two years after the collapse of Enron, complaints regarding the damaging effect on corporate growth of the Act spawned by Enron can be plaintively heard.² However, continuing corporate scandals involving household name companies, including the Italian food giant Parmalat, and the health services company, HealthSouth, have kept the issue of corporate accountability prominently before the public.

In fact, in response to scandals involving the New York Stock Exchange and several prominent mutual funds, the Securities and Exchange Commission ("SEC") and other regulators and law enforcement officials have called for additional regulation of the securities markets.

OVERVIEW OF THE ACT

The focus of the Act and this article is the regulation of the accounting profession and of the auditing and financial reporting process of public companies. For this purpose, a public company is a company, the securities of which is registered under Section 12 of the Exchange Act, or which is required to file reports under Section 15(d) of the Exchange Act, or that files,

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1. See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

2. See Floyd Norris, *Too Much Regulation? Corporate Bosses Sing the Sarbanes-Oxley Blues*, N.Y. TIMES, Jan. 23, 2004, at C1. According to a survey of global chief executives released by PricewaterhouseCoopers at the World Economic Forum, fifty-nine percent of global chief executives surveyed viewed overregulation as a significant risk and more of a threat to corporate growth than global terrorism or currency fluctuations. See *id.*

or has filed a registration statement that has not yet become effective under the Securities Act. In addition, the Act also significantly regulates the corporate functions of public companies, particularly regarding corporate governance, as well as their executives, directors, and outside advisers. Accordingly, this article also discusses the more significant aspects of the Act's impact on these individuals.

The Act affects:

- **public companies**, by subjecting them to enhanced disclosure requirements and requiring them to adopt strict corporate governance standards;
- **officers and directors of public companies**, by requiring them to certify their company's annual and quarterly reports (including, specifically, the financial statements), return profits and bonuses relating to false financial statements and forego loans to them by the company, except in limited circumstances;
- **auditors of public companies**, by requiring them to register and be subject to regulation by a newly-created independent audit review board, and by placing additional restrictions on their ability to perform non-audit services to their audit clients;
- **employees of public companies**, by insulating them from retaliation for reporting questionable corporate activities;
- **securities lawyers who represent public companies**, by requiring them to report to the company's CEO or general counsel, or qualified legal compliance committee, and in some cases, the board of directors, evidence of material violations of securities laws or breaches of fiduciary duty; and
- **investment banks employed by public companies and the research analysts** who are employed by investment banks to follow public companies for investment banks, by subjecting them to increased regulation regarding conflicts of interest between analysts and the banking arm of the investment banks, including increased disclosure of actual and potential conflicts of interest.

The Act also added and increased criminal penalties for certain violations of the U.S. securities laws and increased the statutes of limitation for certain existing private rights of action for violations of certain existing securities laws.

The Act is part of an enhancement of the public company regulatory regime that includes rulemaking by the SEC, other SEC initiatives, changes in stock exchange listing standards and actions by private groups, such as the Financial Accounting Standards Board and the American Institute of Certified Public Accountants, and stricter regulation and enforcement by the secu-

rities law administrators of the individual states. The Act contemplates that the SEC and the stock exchanges, including the New York Stock Exchange (“NYSE”) and the Nasdaq Stock Market (“Nasdaq”), will implement their provisions through rules adopted by them. In some cases, the Act provides significant discretion to these regulators as to how its provisions may be implemented. In other cases, the Act requires specific acts of compliance.

Some of the provisions of the Act are immediately effective. However, in the case of the Public Company Accounting Oversight Board, the Board was not required to become fully functional until April 26, 2003, and auditors were not required to register with the Board until 180 days afterward.³ And in the case of the requirement to file internal control reports with company annual reports, the requirement becomes effective in 2004 for larger U.S. companies and in 2005 for other U.S. companies and for non-U.S. SEC-reporting companies.

In some cases, the Act required expedited rulemaking and implementation of the Act’s requirements. For example, the SEC was required to, and did, adopt regulations regarding the accelerated reporting requirements for public company insiders that became effective on August 29, 2002.

The breadth and depth of the regulatory changes effected by the Act, and the unknown impact of existing and future rulemaking and interpretation, make the Act’s practical requirements and effect difficult to currently evaluate. Moreover, it is unclear at this time what additional exemptions the SEC may adopt to, or alternative versions of, the Act’s requirements insofar as they relate to non-U.S. persons and small business issuers.

What follows is a brief summary of the more significant general provisions of the Act. It is not intended to be comprehensive and should not be relied upon as legal advice. Moreover, it generally only reflects developments through August 2003.

THE ACT’S EFFECT ON PUBLIC COMPANIES

“Real Time” Disclosure Requirements

The Act accelerates a public company’s reporting obligations by requiring “real time” “plain English” disclosure of material changes in the financial condition or operations of a public company.⁴ The Act suggests that such

3. See Management’s Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36,636 (June 18, 2003).

4. See Section 409 of the Act which amended the Exchange Act by adding a new paragraph (l) to Section 13 thereof as follows:

disclosure may include trend and qualitative information and graphic presentations. These disclosures would require subjective determinations by the issuer regarding the materiality of agreements, reduction in revenues from major customers, material direct or contingent financial obligations and material write-offs and impairments. Under the final Rule amending Form 8-K disclosure requirements and deadlines, these judgments, are required to be made within the constraints of a four-business day filing requirement. There are significant consequences for inaccurate or late filings (though the final Rule ameliorates some of those consequences if appropriate disclosure is made by the time of the next required periodic report under the Exchange Act). Compliance with these requirements promises to pose significant challenges for U.S. public companies.⁵

This requirement is a significant departure from existing U.S. law. Previously, companies had broad latitude in the timing of the disclosure of material corporate developments so long as insiders were not trading on the basis of their knowledge. Although not part of the Act, the SEC has also accelerated the filing date requirements for annual reports on Form 10-K and quarterly reports on Form 10-Q. These requirements will be phased-in over three years and do not apply to small business issuers or companies with less than \$75 million in public float.

Management Report on Internal Controls

The Act requires management to establish an internal control structure. Management is also required to prepare a report, to be included in the company's annual report, which assesses the effectiveness of these controls and procedures on the company's financial reporting for the past year. The com-

"(I) REAL TIME DISCLOSURES. Each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest."

Sarbanes-Oxley Act of 2002, § 409, 116 Stat. at 791.

5. See additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release Nos. 33-8400 and 34-49424 (March 16, 2004), available at <http://www.sec.gov/rules/final/33-8400> (last visited April 8, 2004). The Final Rules expand the list of disclosure items under Form 8-K (adding, among others, disclosure regarding 1) material agreements, 2) material financial obligations, 3) sales of unregistered securities, 4) material modifications to the rights of securities holders and 5) actions to delist the company's securities from a national securities exchange or SRO) and shorten the filing deadline for most Form 8-K items to four business days. The expanded disclosure and accelerated reporting requirements are effective as of August 23, 2004 and will operate prospectively only.

pany's outside auditors that prepare its audit report must attest to, and report on, management's internal control assessment. The SEC has adopted rules providing details regarding the content of the report. These reports are required to be included in a public company's annual report on Form 10-K, 20-F, or 40-F, as applicable, beginning with the annual report for its first fiscal year ending on or after June 15, 2004 for accelerated filers; and April 16, 2005 in the case of other U.S. companies and all non-U.S. SEC reporting companies.

This requirement will likely cause senior officers of public companies and their significant subsidiaries of public companies to assume greater responsibility for the accuracy of the financial reports generated by the business operations under their management.

Use of Pro Forma Financial Information

The Act addresses some of the perceived abuses relating to the use of pro forma financial information. It does this by requiring that pro forma financial information, whether appearing in a company's SEC reports or in a company press release or other public disclosure:

- comply with the U.S. federal securities law's standard for accuracy and completeness (that is, the disclosure does not contain an untrue statement of a material fact or omit to state a material fact necessary to make the disclosure not misleading); and
- include a reconciliation with the company's financial statements prepared in accordance with U.S. generally accepted accounting principals ("GAAP").

The SEC has adopted Regulation G,⁶ which governs the use of non-GAAP financial measures in all public disclosures, including earnings releases containing non-GAAP financial measures. Under Regulation G, a non-GAAP financial measure is a numerical measure of a company's past or future financial performance, financial position or cash flows that:

- excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP; or

6. See Conditions for Use of non-GAAP Financial Measures, 68 Fed Reg. 4820 (Jan. 30, 2003).

- includes amounts, or is subject to adjustments that have the effect of excluding amounts, that are excluded from the most directly comparable measure calculated and presented in accordance with GAAP.

Regulation G requires that when a company makes a public disclosure that includes material non-GAAP financial information, it must include a presentation of the “most directly comparable” financial measure calculated and presented in accordance with GAAP and a reconciliation of the differences between the non-GAAP financial measure with the “most directly comparable” financial measure calculated and presented in accordance with GAAP.

Other Financial Information Requirements

In a requirement of potentially far-reaching consequence, the Act requires public companies to provide in each annual and quarterly SEC filing disclosure of all material that may have a material current or future effect on the company’s (i) financial condition, (ii) changes in financial condition, (iii) results of operations, (iv) liquidity, (v) capital expenditures, (vi) capital resources, or (vii) significant components of revenues or expenses, including:

- off-balance sheet transactions, arrangements, obligations (including contingent obligations); and
- other relationships of the company with unconsolidated entities or other persons.

Audit Committees

The Act requires all audit committee members to be independent. The Act also requires companies to grant their audit committee authority over the selection, compensation, and oversight of outside auditors. Compounding the difficulty of complying, the Act sets a stricter standard for determining independence. A person is considered “independent” only if he does not receive any consulting or similar fees from, and is not affiliated with, the company or any of its subsidiaries, other than in his capacity as a director.

In addition, the Act requires public companies to disclose whether or not its audit committee has at least one member who is a “financial expert,” and, if not, an explanation of why not. The SEC has defined “financial expert” in its rulemaking as a person who has the following attributes:

- (i) An understanding of generally accepted accounting principles and financial statements;
- (ii) The ability to assess the general application of such principles in connection with the accounting for estimates accruals and reserves;
- (iii) Experience preparing, auditing, analyzing, or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonable be expected to be raised by the registrant's financial statements, or experience actively supervising one or more person engaged in such activities;
- (iv) An understanding of internal controls and procedures for financial reporting; and
- (v) An understanding of audit committee functions.⁷

Under the Act, the SEC has directed the national securities exchanges (that is, the NYSE, AMEX, and Nasdaq) to prohibit the listing of the securities of companies that do not have an audit committee that complies with the requirements of the Act.

Both the NYSE and Nasdaq have adopted rules relating to corporate governance standards that in some respects are stricter than the standards included in the Act. For example, both the NYSE and Nasdaq rules require that the nominating and compensation committees of public companies consist solely of independent directors. Moreover, to empower non-management directors, the rules of both NYSE and Nasdaq require non-management directors to meet regularly and participate more directly in approval of related party transactions, the nomination of directors, and the determination of CEO compensation.

Enhanced SEC Review of Periodic Reports and Enforcement Powers

The Act requires the SEC to review disclosures, including financial disclosure, made by public companies that have a class of securities listed on a national securities exchange or Nasdaq "on a regular and systematic basis" and, in any case, at least once every three years. This provision of the Act is intended expressly to include review of the periodic filings of non-U.S. companies.

The Act gives the SEC and the U.S. federal courts additional enforcement and injunctive powers. For example, the SEC now has the power to impose a forty-five-day freeze (which can be extended in some circum-

7. See Instruction to paragraph (h)(1) of Item 401 of Regulation S-K.

stances) on extraordinary payments to a company's directors, officers, agents or employees by a company that is under investigation.

In addition, the Act amends current law to permit a court, in an action brought by the SEC, to prohibit a person who violates the antifraud provisions of the securities laws from acting as an officer or director of a public company when the conduct indicates the "unfitness," versus the current standard of "substantial unfitness," to serve as an officer or director. The SEC may also issue orders to such effect in some circumstances.

THE ACT'S EFFECT ON DIRECTORS AND OFFICERS

Certifications of Periodic Reports

Under the Act, the chief executive and chief financial officers of public companies must comply with two separate certification requirements with respect to their company's periodic reports filed with the SEC. The Act does not indicate, and the SEC has provided no guidance as to, whether the two separate certification requirements can be satisfied by use of one certification. In addition, the NYSE's corporate governance rules require CEOs of NYSE-listed companies to certify annually to the SEC as to their company's compliance with NYSE corporate governance listing standards.

In the certification required by Section 906 of the Act, chief executive officers and chief financial officers must certify in a written statement accompanying the filing of their company's period reports that:

- such periodic report "fully complies" with the requirements of Section 13(a) and 15(d) of the Exchange Act; and
- the information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the company.

These certifications may not be qualified as being to the knowledge of the officer giving the certifications. However, the officer is only subject to criminal penalties when the officer has knowledge of the non-compliance. The Act provides no guidance on what it means for the certification to "accompany" the report. The approach most commonly used to date has been to file the certification as an exhibit to the report. Another approach is to file the certification in a non-public EDGAR (the SEC's electronic filing system for public companies) correspondence format along with the report, and to concurrently file the certification with the SEC on a current report (Form 8-K for domestic companies; Form 6-K for foreign private issuers).

The Act makes it a federal crime, punishable by imprisonment, to make a false certification. An officer who certifies that a report complies while “knowing” that the report in fact does not comply, can be fined up to \$1 million or imprisoned up to 10 years. If this false certification is made “willfully,” the officer may be fined up to \$5 million and imprisoned for up to 20 years, or both. The Act does not address the consequences of failing to file the certification or filing a certification that does not comply with the Act.

In addition, under Section 302 of the Act, pursuant to rules adopted by the SEC and effective August 29, 2002, a public company’s principal executive officer and principal financial officer must certify the contents of the company’s quarterly and annual reports. The certification must provide that the officer has:

- reviewed the report;
- based on the officer’s knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading;
- the officer and the other certifying officers of the company:
 - are responsible for establishing and maintaining “disclosure controls and procedures” for the company;
 - have designed such disclosure controls and procedures to ensure that material information is made known to them;
 - have evaluated the effectiveness of the company’s disclosure controls and procedures within 90 days of the date of the report; and
 - have presented in the report their conclusions about the effectiveness of the disclosure controls and procedures based on their evaluation;
- the officer and other certifying officers have disclosed to the company’s auditors and to the audit committee of the board:
 - all significant deficiencies in the design or operation of internal controls which could adversely affect the company’s ability to record, process, summarize and report financial data, and have identified for the company’s auditors any material weaknesses in internal controls; and
 - any fraud, whether or not material, that involves management or other employees who have a significant role in the company’s internal controls; and
- the officer and other certifying officers have indicated in the report whether or not there were significant changes in internal controls or in

other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with respect to significant deficiencies and material weaknesses.

In connection with the adoption of Section 404 of the Act's rules concerning management reports on internal controls and related auditor's attestation reports, the SEC amended the required certification regarding the adequacy of disclosure controls and procedures. This certification requires the evaluation of disclosure controls as of the end of the period covered by the registrant's report under the Exchange Act. Moreover, the final rules adopted by the SEC make clear that the certification relates to an evaluation, not only of the issuer but also of its consolidated subsidiaries.⁸

Code of Ethics

Pursuant to the Act, the SEC adopted rules requiring all public companies, including non-U.S. companies, to disclose in their periodic reports whether they have adopted a code of ethics for their senior financial officers. The final rules, as adopted, extended this requirement to the issuer's principal executive officer, as well as its principal financial officer and principal accounting officer or controller or officer with similar functions. If the company has not adopted a code, it is required to disclose the reasons why it has not adopted a code, thus placing an onus on any company that fails to adopt a code of ethics. Moreover, the Act requires a public company to immediately disclose any change or waiver of any provision of a code of ethics for any principal executive officer or senior financial officers on Form 8-K, or by dissemination on the Internet or other electronic means.

In addition, the NYSE's and Nasdaq's corporate governance rules expand the requirements of the Act. These proposals contemplate the mandatory adoption of a code of ethics. These codes of ethics govern the conduct of all directors, officers and employees of public companies listed on the NYSE or Nasdaq and promptly disclose any waivers of the code for directors and executive officers. Non-U.S. companies are exempt from the NYSE rule and are also probably exempt from the Nasdaq requirement.

8. See Item 601(b)(31) of Regulation S-K.

Disgorgement of Bonuses and Profits

Under the Act, if the material noncompliance of the company with the financial reporting requirements of the securities laws results from “misconduct:”

- the Act “requires” a public company to restate its financials; and
- the CEO and CFO of the company must reimburse the company for any bonus or other incentive or equity-based compensation received by the officer from the company during the twelve-month period following the first public issuance or filing with the SEC of the financial information, as well as any profits realized from the sale of securities of the company during such period.

However, the Act does not provide any guidance regarding:

- how to determine whether the restatement resulted from the misconduct (or what constitutes “misconduct”), or whose misconduct is relevant; or
- when such restatements are “required,” as opposed to when they are discretionary by the company.

Companies and commentators are seeking clarification of these requirements from the SEC.

The SEC has the authority to exempt any person from these provisions and non-U.S. companies are expected to lobby to obtain exemptions for their officers.

Prohibition on Personal Loans to Directors and Executive Officers

The Act makes it unlawful for any company, directly or indirectly, including through a subsidiary, “to extend or maintain credit, to arrange for the extension of credit, or to renew any extension of credit, in the form of a personal loan to or for any director or executive officer (or the equivalent thereof)” of the company. Although most types of loans that have historically been made to management are now prohibited, the Act grandfathers extensions of credit in place on the date of adoption of the Act (but not material modifications thereto or renewals thereof). Among others, the Act prohibits companies from making officer relocation loans and loans to officers to enable them to purchase company equity. The application of the prohibition to some compensation arrangements (such as split dollar insurance policies) is currently unclear.

Although many questions remain, some practitioners have focused on the language of Section 402 of the Act and suggested that the prohibitions of the Section apply only to transactions that meet two separate requirements:

- the transaction must take the form of a loan, and not merely be an extension of credit (such as an advance of funds for indemnification, or where the intent is to confer a compensation benefit such as a tax indemnity payment); **and**
- the loan must be a “personal loan.”

Under this view, a loan is not a “personal loan” if the primary purpose of the loan is to advance the business of the company. This would exclude business travel advances and use of company credit cards and company cars. Under this view the following transactions would be permitted:

- travel and similar advances;
- personal use of a company credit card, if the individual is required to repay within a reasonable period of time after the charges have been presented;
- personal use of a company car, if limited and ancillary to business use and reimbursement is required to be settled within a reasonable period of time;
- relocation payments (treated the same as travel since primarily for a business purpose);
- “stay” and “retention” bonuses subject to repayment, if they must be repaid and they are contingent upon employment or a similar condition;
- indemnification advances;
- deferred compensation in which an executive officer makes an “investment” (through deferring compensation) in an index or notational assets with terms giving them a favorable return;
- tax indemnity for payments to overseas-based executive officers;
- loans from 401(k) plans;
- loans from annuities and other broad-based employee benefit plans; and
- “cashless” option exercises.

Acceleration of Section 16 Reporting Obligations

The Act amends the Exchange Act to require directors, officers, and ten percent shareholders to disclose any change in their ownership of equity securities before the end of the second business day following the day on which the change in ownership occurs. The SEC has modified this deadline

in the case of certain transactions where the insider does not select the date of execution of the transaction resulting in the ownership change such as:

- transactions pursuant to Rule 10b5-1(c) plans (which provide a safe harbor from the antifraud provisions of Rule 10b5 under the Exchange Act) that provide for purchases and sales triggered by the occurrence of certain events; and
- specified transactions under employee benefit plans, such as fund-switching transactions.

The Act also requires that insiders file electronically with the SEC the forms disclosing changes in ownership within one year of the effective date of the Act. The SEC is required to publish such statements on an Internet accessible site no later than the end of the business day following the filing and companies are required to put the statements on their corporate websites, if they have one.

Improper Influence on Conduct of the Audit

The SEC has adopted rules making it unlawful for any officer or director of a public company to fraudulently influence, coerce, manipulate, or mislead any accountant for the purpose of rendering a company's financial statements materially misleading. Rule 13b2-2 prohibits officers and directors of an issuer, and persons acting under their direction, from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence any independent public or certified public accountant engaged in the performance of an audit or review of the financial statements of that issuer that are required to be filed with the SEC if they knew or should have known that such action, if successful, could result in rendering the issuer's financial statements materially misleading. In the case of registered investment companies, the rule also covers officers and directors of the investment advisor to the investment company and an investment company's sponsor, depositor, trustee, and administrator.

Restrictions on Trades During Pension Plan Blackout Periods

The Act prohibits directors and executive officers from purchasing, selling, or otherwise acquiring or transferring any equity security acquired as part of their compensation during a "blackout period." A "blackout period" is a period designated by the company and applicable to not less than fifty percent of the participants or beneficiaries in plans maintained by the company that prohibits trades during a period of more than three consecutive

business days. The profits from any transactions made in violation of this prohibition must be paid to the company. The Act provides a private right of action to compel such payment or, if the company fails to bring suit within 60 days of a request, by a securityholder in the name of the company. Companies must provide notice of blackout periods to the SEC, as well as to officers and directors of the company.

The Department of Labor will likely take additional regulatory action, pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), that will require companies to provide notice to employees of blackouts and may also prohibit discriminatory exercises by executives during a blackout period.

IMPLICATIONS FOR AUDITORS

Public Company Accounting Oversight Board

Under the Act, the SEC has established a five-member Public Company Accounting Oversight Board ("Board"). The initial Board was appointed in October, 2002. The SEC retroactively approved the Board's by-laws effective January 2003. (These by-laws were adopted by the Board on January 9, 2003 and amended on April 25, 2003.) Three of the Board's members must be non-accountants and two members must be or have been certified public accountants. All members must be "prominent individuals of integrity and reputation." The SEC approved William J. McDonough, the former president of the Federal Reserve Bank of New York, to be chairman in May 2003. Mr. McDonough's appointment followed the resignation of William H. Webster as a result of concerns about his role as an audit committee member of a financially troubled company.

The Board's jurisdiction extends to registered public accounting firms and their associated persons. The Board does not regulate accounting firms that perform services only for private companies.

The primary purpose of the Board is to:

- register public accounting firms;
- establish or adopt auditing, quality control, ethics, independence, and other standings relating to the preparation of audit reports;
- conduct inspections of registered public accounting firms;
- conduct investigations and disciplinary proceedings concerning registered public accounting firms and associated persons; and
- enforce compliance with the Act, the Board's rules, professional standards, and the securities laws relating to the preparation of audit reports by registered public accounting firms and associated persons.

The Board members are authorized to propose rules and adopt auditing and other professional standards subject to the approval and oversight of the SEC.

Mandatory Registration with the Board

Every public accounting firm that prepares or issues, or participates in the preparation or issuance of, any audit report with respect to any public company must be registered with the Board. This requirement means that any accounting firm that participates in the audit of a public company or one of its consolidated subsidiaries must be registered. Mandatory registration becomes effective 180 days after the date that the SEC determines that the Board is capable of carrying out its obligations (which occurred on April 25, 2003). Non-U.S. public accounting firms that participate in audits of U.S. or non-U.S. Sec reporting companies were granted an 180-day grace period and must register by April 19, 2004.

The Board has developed a form application for registration. The registration application includes a “consent” to cooperation in and compliance with any request for testimony or production of documents made by the Board. The application also includes an agreement to secure similar consents from each of the firm’s “associated persons.”

Although non-U.S. accounting firms are generally subject to the same requirements as their U.S. counterparts, the Board’s rules permit a certain narrowing of the scope of the disclosure required of non-U.S. public accounting firms in the registration process such as:

- a non-U.S. public accounting firm is permitted to limit disclosure to the associated accountants with status as proprietor, partner, principal, shareholder, officer or manager of the firm, as opposed to *all* accountants in the case of U.S. firms, and who provided at least ten hours of audit services to an issuer client during the last calendar year; and
- a non-U.S. public accounting firm is permitted to withhold from its application information prohibited from disclosure under a non-U.S. law, by submitting 1) a copy in English of the conflicting non-U.S. law, 2) a legal opinion regarding the conflict, and 3) an explanation regarding the applicant’s efforts to eliminate the conflict by seeking consents or waivers, if applicable.

Auditing, Quality Control, Ethics and Independence Standards

The Board's auditing standards must include at least the following standards for all registered public accounting firms:

- the firm must retain for at least seven years audit work papers and other information in sufficient detail to support the conclusions reached in the audit report;
- the Board may require the retention of records (not otherwise required) for purposes of Board inspections; and
- the firm must provide a concurring or second partner to review and approve each audit report and must describe in each audit report the scope of the auditor's testing of the internal control structure and procedures of the public company and present, in its report or a separate report, the firm's findings from such testing, an evaluation of the internal control structure, and a description of material weaknesses in such internal controls and circumstances or instance of noncompliance with the Board's rules and standards.

Inspections, Investigations and Disciplinary Procedures

The Act requires the Board to conduct a program of inspections to assess compliance by each registered public accounting firm and its associated persons with the Act, and SEC and Board rules, and professional standards. Board inspections replace the existing "peer review" system and must be conducted annually for each registered firm that regularly provides audit reports for more than 100 issuers and less often for other firms. The results of these inspections will be available for public review, subject to the protection of confidential and proprietary information. However, no portion of the report that contains criticism or defects in quality control systems shall be made public if the firm addresses these criticisms or defects within twelve months after the date of the inspection report.

Except to the extent discussed above, non-U.S. accounting firms that sign audit reports for any SEC registrant are fully subject to the Act. In addition, accounting firms, even if they do not issue audit reports, but nonetheless play a substantial role in the preparation and furnishing of reports for particular public companies, are also required to register with the Board. This appears to require all firms that audit subsidiaries of public companies, including non-U.S. accounting firms, to register with the Board.

Auditor Independence

A primary focus of the Act is auditor independence. To ensure an auditor's independence the Act prohibits a company's auditors from concurrently providing certain specified categories of services while also providing audit services to the company, whether or not approved by the company's audit committee. These services are:

- bookkeeping;
- financial information systems design and implementation;
- appraisal or valuation services;
- fairness opinions, or contribution-in-kind reports;
- actuarial services;
- internal audit outsourcing services;
- management or human resources services;
- broker or dealer, investment adviser or investment banking services;
- legal services and expert services unrelated to the audit; and
- expert services unrelated to the audit.

The Board is authorized to exempt companies or audit firms from these prohibitions on a case-by-case basis. Such exemptions would probably be restricted to situations where the discontinuation of an auditor's non-audit services would result in extreme hardship to the company.

The Act permits a company's auditors to perform any other non-audit services (such as "tax services," which could encompass a broad range of services) for the company, but only if approved in advance by the company's audit committee. More broadly, the Act requires a public company's audit committee to pre-approve audit and non-audit engagements by firms that provide audit services to the company and to disclose the approval in the company's periodic reports filed with the SEC. Under Rule 2-01(3)(1) an accountant is not independent unless either:

- before the accountant is engaged by the issuer or its subsidiaries to render an audit or non-audit service, the engagement is approved by the issuer's audit committee, or
- the engagement to render the service is entered into pursuant to pre-approval policies and procedures established by the audit committee of the issuer, subject to:
 - the requirement that the policies and procedures must be detailed as to the particular service;
 - the audit committee is informed of each service; and

- such policies and procedures do not include delegation of the audit committee's responsibilities to management.

The pre-approval process extends also to audit and non-audit services provided by accounting firms other than the issuer's principal auditor. The audit committee has no required role, however, regarding non-audit services provided by a firm that is not involved in the audit of the SEC-filed financial statements.

Under the rules, issuers must also disclose aggregate fees billed by their accountants for audit services, audit-related services, tax services, and all other services for each of the last two fiscal years. In addition, the rules require issuers to disclose the audit committee's pre-approval policies and procedures.

Auditor Reports to Company Audit Committees

The Act requires auditors that perform an audit for a public company to report to the company's audit committee:

- the "critical accounting policies" and practices to be used in the audit;
- all "alternative treatments" of financial information permitted by GAAP that have been discussed with management officials, the ramifications of the use of the "alternative disclosures" and the treatment preferred by the audit firm; and
- any other material written communications between the audit firm and the company's management, such as a management letter or schedule of unadjusted differences.

Other Provisions of the Act Affecting Auditors

In addition, the Act requires the rotation of 1) the lead (or coordinating audit) partner who has primary responsibility for the audit or 2) the audit partner who reviews the audit every five years. The Act also prohibits an audit firm from auditing a company if the company's CEO, controller, CFO, CAO, or any person serving in an equivalent position was employed by the auditor and participated in any capacity in the audit of the company within one year prior to the date of the initiation of the audit.

The SEC has also adopted rules under the Act regarding audit partner rotation, reports to audit committees and the cooling-off period requirements, and a rule relating to compensation of audit partners not mandated by the Act. These rules:

- require rotation of certain audit partners after five or seven years, depending on the partner's role in the audit engagement;
- prohibit compensation of audit partners based upon procuring non-audit services for audit clients;
- require a one-year cooling-off period prior to employment by an issuer of certain former members of the accountant's audit engagement team; and
- mandate that auditors and audit committees communicate about critical accounting policies and alternative GAAP treatment for material items.

WHISTLEBLOWER PROTECTION

The Act protects employees of a public company who assist or participate in investigations by U.S. enforcement or regulatory authorities of certain fraud-related activities. The Act provides for the payment of compensatory and special damages to such employees and makes it a crime, punishable by fine and up to ten years of imprisonment to retaliate against an employee who provides truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense.

ATTORNEY PROFESSIONAL RESPONSIBILITY

The Act requires attorneys, including in-house and outside counsel, to report evidence of corporate wrongdoing to the boards of directors of the companies that they represent. Specifically, the Act requires attorneys to report evidence of a material violation of securities law or breach of fiduciary duty to the company's general counsel or chief executive officer. If the general counsel or CEO does not respond appropriately to the evidence, the attorney must present the evidence to the company's board of directors, or audit committee or other committee of the board of directors comprised solely of directors who are not members of the issuer's management.

The SEC has adopted rules to implement Section 307's requirement for the establishment of minimum standards of professional conduct for attorneys practicing before the SEC in the representation of issuers. These rules go beyond the requirements of Section 307 and are arguably the most controversial of all provisions adopted by the SEC to implement the Act.

The rules require covered attorneys who become aware of "credible evidence" of a "material violation" on the part of the issuer or its agent to report such evidence "up-the-ladder" within the issuer and to determine whether an "appropriate response" has been undertaken. The final rules exclude, the controversial requirement of "noisy withdrawal" from representation of the issuer and notification of the SEC if the issuer has not appropriately responded to the attorney's report of the issuer's violation and permit

the report of the perceived violation to a qualified legal compliance committee, if established by the issuer, as an alternative to “up-the-ladder reporting”. However, simultaneously with the adoption of the final rules, the SEC proposed an alternative withdrawal and notification procedure that would require a covered attorney faced with “credible evidence” of a “material violation” to withdraw and notify the issuer. The issuer would be required to disclose the withdrawal and attendant “circumstances” to the SEC within two business days on Form 8-K, 20-F or 40-F, as applicable.

The rules for the most part do not apply to non-U.S. attorneys and non-practicing attorneys.

OTHER IMPORTANT PROVISIONS OF THE ACT

Lengthening of Statute of Limitations for Private Securities Fraud Actions

The Act extends the statute of limitations for private securities law fraud actions to the earlier of two years (from one year) after the date of discovery of the facts constituting the violation, or five years (from three years) after the violation itself.

Securities Fraud Debt Not Dischargeable in Bankruptcy

The Act effects a change in U.S. bankruptcy law by providing that debts incurred in violation of securities fraud laws, or as part of a common law fraud in connection with the purchase or sale of a security, and that result from a judgment, settlement, or other resolution of a judicial or administrative proceeding, are no longer dischargeable in a U.S. bankruptcy proceeding.

New Criminal Penalties

The Act makes it a crime under federal law to commit securities fraud involving a public company. The Act provides for fines or imprisonment or both for any person that knowingly executes, or attempts to execute, a scheme or artifice (i) to defraud any person in connection with any security of a public company or (ii) to obtain by means of false pretenses, any money or property in connection with the purchase or sale of any security of a public company.

The Act also makes it a crime to destroy records in any federal investigation or bankruptcy. The Act states that “whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct or

influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under” the bankruptcy code, will be fined or imprisoned for not more than twenty years or both.

Increased Federal Criminal Penalties

The Act increases the penalties for a “willful” violation by an individual of the Exchange Act from a fine of up to \$1 million to a fine of up to \$5 million, and from imprisonment of up to ten years to imprisonment up to twenty years. The maximum fine for entities is increased from \$2.5 million to \$25 million.

The Act also increases the penalties for mail fraud and wire fraud from a maximum of five years imprisonment to a maximum of twenty years imprisonment. In addition, the Act increases criminal penalties for violations of ERISA from one year to ten years imprisonment, with additional increases in the fines permitted.

Moreover, the Act extends these same penalties to persons who attempt or conspire to commit an offense such as wire fraud, mail fraud, and securities fraud.

Disgorgement Fund

Section 308 of the Act authorizes the SEC to establish a disgorgement fund using the civil monetary penalties and settlements in enforcement actions for securities law violations for the benefit of the victims of those violations.

Although the effective date of this provision is July 30, 2002, the SEC has interpreted the Section’s provisions to be applicable based on the date that the funds are received. For example, the SEC has applied the \$500 million cash and \$250 million stock settlement received as a civil penalty from WorldCom in connection with the settlement approved by the court on July 7, 2003 of an action brought relating to the company’s accounting fraud, an event that pre-dated the enactment of the Act. The SEC has also announced its intention to direct payments of \$135 million and \$125 million to be received from J.P. Morgan Chase & Co. and Citigroup Inc., respectively, to the disgorgement fund. These payments relate to settlement of claims brought by the SEC for these banks’ roles in several structured finance transactions of Enron and Dynegy (in the case of Citigroup) that were allegedly used to distort the companies’ financial picture.

Research Analysts

Section 501 of the Act addresses concerns about conflicts of interests that may arise when securities analysts recommend equity securities in research reports and public appearances and seeks to enhance the objectivity of research and provide investors with more useful and reliable information.

The rules adopted by the self-regulatory agencies and approved by the SEC impose a number of restrictions designed to limit the ability of member firms to use research to obtain investment banking business and to reduce conflicts of interest that research analysts may have, either because of the firm's investment banking business or because of personal relationships that the analyst may have with the companies covered by the analyst, including those relating to securities ownership.

Rating Agencies

Section 702 of the Act requires the SEC to conduct a study of the role and function of credit rating agencies in the operation of the securities markets. The study's scope includes six areas:

- the credit agencies' role in evaluating issuers;
- the importance of that role to investors and the markets;
- any impediments to accurate appraisals by the agencies;
- any entry barriers to the credit agency business and measures needed to remove those barriers;
- measures to improve dissemination of rating agency appraisals of issuers; and
- conflicts of interest in rating agency operations and ameliorative measures.

SUMMARY OF IMMEDIATE CONCERNS

For Companies and Their Management

CEO/CFO Certifications

- Non-U.S. companies should immediately begin the internal process to support certifications and review and revise internal control systems as appropriate
- U.S. companies may require officers of their subsidiaries and divisions to certify to the financial controls and results as they relate to their local operations

Loans to Directors and Executive Officers

- Prohibitions on loans and extensions of credit will have an immediate effect on management of public companies and will make it more difficult to attract and retain top management personnel
- Exceptions to the Act's prohibition mitigate this burden for banks and other financial institutions
- The impact on routine corporate extensions of credit is still uncertain but it seems likely not to prevent:
 - travel and similar advances
 - use of company credit cars
 - use of company cars
 - relocation payments
 - "stay" and "retention" bonuses
 - indemnification advances
 - deferred compensation arrangements
 - tax indemnity loans to overseas-based executives
 - 401(k) plan loans

Whistleblower Protection

- Management will need to review their personnel policies for possible changes.

Forfeiture of Bonus and Share Trading Profits

- CEOs and CFOs of public companies could be made to reimburse the company for any bonus or other incentive-based compensation, as well as profits from the sale of company securities, received during the twelve-month period following initial publication of financial statements required to be restated as the result of material noncompliance with financial reporting requirements due to misconduct.

Restrictions on Trades During Pension Plan Blackout Periods

- The prohibition on trades made during benefit plan "black-out" periods may cause companies to revise plan procedures for their management.

Audit Committees

- Members of audit committees must be “independent” as defined in the Act, significantly restricting the ability of committee members to receive compensation from the company or be affiliated in any manner with the company; and
- The entire board of directors of public companies that do not have an audit committee will be considered the audit committee and thus subject to these restrictions.

“Real Time” Disclosure

- An expanded Form 8-K may be used by public companies to report significant events on a current (four days after occurrence) basis;
- Trend and qualitative information may be required to be included in a company’s MD& A.

Internal Controls Disclosure

- Public companies must establish and maintain an adequate internal control structure and financial reporting procedure
- Management will be subject, both directly and indirectly, to the requirement to prepare internal controls reports

Pro Forma Financial Information

- The Act requires companies reporting results on a pro forma basis to reconcile these results with financial results prepared in accordance with GAAP

Extension of Statute of Limitation for Private Securities Actions

- Investors now have two years after the disclosure of an alleged fraud or five years after the violation itself to initiate a suit based on violation of Rule 10b-5 of the Exchange Act, rather than the one and three year limits that previously applied.

For Audit Firms

Auditor Oversight Board

- Audit firms that audit SEC-registered companies will be required to be registered with the Board;
- The Board may require by rule the registration of accounting firms that audit subsidiaries and divisions of public companies or which otherwise play a “substantial role” in the audits of such companies;
- The Board will adopt and administer accounting rules that auditors that are registered with the Board will be required to follow.

Auditor Independence and Rotation

- Audit firms that audit a public company will be prohibited from providing specified non-audit services to the companies they audit, and may only provide other services with the consent of the audit committee;
- Such firms will also be required to rotate audit partners;
- Audit partners may no longer be compensated based on the generation of non-audit service-related business from audit clients;
- Public companies will be restricted from employing their former auditors within one year of such individuals’ involvement in auditing the company.

SOME REALISM ABOUT UNILATERALISM

ANTHONY CHASE*

"The fresh look is always the fresh hope."

—Karl Llewellyn¹

THE GREAT FEAR

A specter is haunting international politics—the specter of American unilateralism.² Robert Rubin, the highly regarded former United States ("U.S.") Secretary of the Treasury, told National Public Radio's Diane Rehm that he hoped 2004 would bring a national debate over the country's "relatively unilateralist policy," an approach to "how we deal with the rest of the world" that is "not going to work but also creates an enormous antagonism against the United States."³ At one level, anxiety about American unilateralism simply expresses a desire that U.S. foreign policy, and the way it is applied, should be popular with as many nations as possible. And it would be nice if some of those nations could more enthusiastically support American policy, whether diplomatically, financially, or militarily.

At another level, the unilateralist critique covers concerns about an American embrace of the doctrine of preemption or preventative wars⁴ as

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1. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 510 (1960).

2. See generally NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA'S QUEST FOR GLOBAL DOMINANCE* (2003); SAUL LANDAU, *THE PRE-EMPTIVE EMPIRE: A GUIDE TO BUSH'S KINGDOM* (2003); CLYDE PRESTOWITZ, *ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* (2003). For a wide range of contributors with conflicting views on the subject, see generally *UNDERSTANDING UNILATERALISM IN AMERICAN FOREIGN RELATIONS* (Gwyn Prins ed., 2000) [hereinafter Prins]; *UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES* (David M. Malone & Yuen Foong Khong eds., 2003) [hereinafter Malone & Khong].

3. *The Diane Rehm Show* (WAMU radio broadcast, Dec. 2, 2003), http://www.wamu.org/dr/2003/drarc_031201.html (audio commentary) (last visited Mar. 27, 2004).

4. Jeff Guntzel, *Iraq Peace Team Briefing #2: Preemptive Strikes and International Law*, Aug. 27, 2002, http://www.iraqpeaceteam.org/pages/iptbriefing_2.html (last visited Mar. 27, 2004).

Addressing an enthusiastic crowd of West Point Military Academy graduates on June 1, 2002, George W. Bush declared, "Our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend

well as an abandonment of the long-standing U.S. commitment to the United Nations ("U.N.") organization.⁵ Does the launching of preemptive wars revealed a new and dangerous departure in American foreign policy? Has American deployment of military force without U.N. Security Council support signaled that the U.S. has decided to undercut the premiere world peace organization, an institution the U.S. played such a critical role in bringing into existence? The purpose of this essay is to measure the current criticism of American unilateralism against both the reality of contemporary politics and the rules of international law.

our lives." The crowd roared. Bush was thinking about Iraq that morning. He was not thinking about international law.

Id.

5. See Richard Falk & David Krieger, *Subverting the UN*, THE NATION, Nov. 4, 2002, http://www.thirdworldtraveler.com/United_Nations/Subverting_UN.html.

To save the UN from the [Bush] Administration's destructive and radical unilateralism, other key nations will have to stand up to its bullying. France, Russia and China, because of their veto power in the Security Council, could withhold legal authority for America to proceed to war. Whether they will exercise this power, given the pressure they're under from the Administration, remains to be seen If [the US] were to go ahead with war, it could deliver a death knell not only to Iraq but also to the UN itself. It is emblematic of US global waywardness that it is necessary to hope for a veto to uphold the legitimacy and effectiveness of the UN as a force for peace but to also be concerned that Administration threats of unilateral military action could render the veto ineffective and thereby the role of the Security Council largely meaningless.

Id. Within months, the fears of Falk and Krieger were realized. See Matthew Rothschild, *Bush Trashes the United Nations*, THE PROGRESSIVE, April 2003, <http://www.progressive.org/april03/roth0403.html> (last visited Mar. 27, 2004); see also Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May-June 2003, <http://www.foreignaffairs.org/20030501faessay11217/michael-j-glennon/why-the-security-council-failed.html> (last visited Mar. 27, 2004).

[O]n March 5 [2003], France and Russia announced they would block any subsequent resolution authorizing the use of force against Saddam. The next day, China declared that it was taking the same position At this point it was easy to conclude, as did President Bush, that the UN's failure to confront Iraq would cause the world body to "fade into history as an ineffective, irrelevant debating society." In reality, however, the council's fate had long since been sealed. The problem was not the second Persian Gulf War, but rather an earlier shift in world power toward a configuration that was simply incompatible with the way the UN was meant to function. It was the rise in American unipolarity—not the Iraq crisis—that, along with cultural clashes and different attitudes toward the use of force, gradually eroded the council's credibility.

Glennon, *supra*.

FIRST STRIKE

The current language of “preemptive strikes” originates in American political discourse immediately following the Second World War.⁶ Kenneth Waltz observes that during the brief period when the U.S. alone possessed nuclear weapons, it was debated whether we should “drop the bomb quickly before the likely opponent in a future war has time to make his own.”⁷ The question remained unanswered on that summer afternoon in 1949 when news arrived that the Soviets, within five months of the establishment of NATO, had detonated an atomic device in Kazakhstan. On the one hand, such strategic thinking could lead to George C. Scott’s hysterical antics in front of the NORAD-like global positioning map in Stanley Kubrick’s classic motion picture, *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* (1964). On the other hand, one suspects that when India and Pakistan periodically approach the brink of nuclear war over Kashmir, most Americans hope the Pentagon has something up its sleeve, designed to preempt the kind of atomic conflagration on the Indian subcontinent which, uncontrolled, might finally produce Carl Sagan’s legendary “nuclear winter.”

But the most recent version of anti-preemption ideology was ably, even nobly, offered by West Virginia Democrat, Robert C. Byrd, on the floor of the U.S. Senate, in February, 2003.⁸ Undaunted by the drum beat of war or the building momentum behind President Bush’s Iraq invasion plan, Senator Byrd deplored his colleagues’ willingness to “stand passively mute” while the country was dragged into a potentially disastrous war. “This nation,” declared Byrd, “is about to embark upon the first test of a revolutionary doctrine.”⁹ The senator did not hesitate to identify it: the doctrine of preemption, he asserted, “the idea that the United States or any other nation can legitimately attack a nation that is not imminently threatening but may be threatening in the future—is a radical new twist on the traditional idea of self-defense.”¹⁰ Not least was Byrd’s concern that the preemption doctrine “appears to be in contravention of international law and the UN Charter.”¹¹

6. Arthur Schlesinger, Jr., *Good Foreign Policy a Casualty of War: Today, It Is We Americans Who Live in Infamy*, LOS ANGELES TIMES, Mar. 23, 2003, at M1, available at <http://www.commondreams.org/views03/0322-01.htm> [hereinafter Schlesinger I].

7. KENNETH WALTZ, *MAN, THE STATE, AND WAR* 236 (rev. ed. 2001).

8. Senator Robert C. Byrd, *Senate Remarks: We Stand Passively Mute*, Feb. 12, 2003, http://byrd.senate.gov/byrd_speeches/byrd_speeches_2003february/byrd_speeches_2003march_list/byrd_speeches_2003march_list_1.html (last visited Mar. 27, 2004).

9. *Id.*

10. *Id.*

11. *Id.*

Arthur Schlesinger heralded Byrd's comments, endorsed a plan to have the senator's "doctrine of preemption" speech printed in the New York Times as a "full-page advertisement," and decried the fact the U.S. was going to war "not because of enemy attack," but because of "the Bush Doctrine of preventive war."¹² Like Byrd, Schlesinger saw the radical preemption doctrine as representing "a fatal turn in U.S. foreign policy."¹³ Schlesinger had himself argued the previous summer that "[o]ne of the astonishing events of recent months is the presentation of preventive war as a legitimate and moral instrument of U.S. foreign policy."¹⁴ Denied legitimacy, morality, and any basis in law or the Charter of the U.N., how could such a "revolutionary doctrine" have been adopted as the driving principle behind the deployment of American troops abroad, in the Iraqi desert, very definitely in harm's way?¹⁵

In order to answer this question it is necessary to juxtapose, to the admonitions of Byrd and Schlesinger, two interesting and widely-acknowledged features of American political history.¹⁶ First, as was frequently observed at the time of the September 11, 2001, terrorist assault on New York and Washington, Americans are hardly accustomed to having their homeland attacked.¹⁷ Whether as targets of bombers, missiles or civilian aircraft transformed into missiles; this was something new and uncomfortable, and deeply traumatizing, for many thousands of Americans.¹⁸ The territory of the U.S. and its possessions had not been attacked since the bombing of Pearl Harbor in 1941.¹⁹ And setting that devastating strike on America's Pacific fleet to one side, the country had never been attacked, let alone invaded, at least not since the British, our partners at the time in a not so special relationship, rather unceremoniously burned the White House in 1814.²⁰ Dolly Madison managed to save a full-length portrait of George Washington from the flames.

Second, another common observation, provided for our purpose here by Seymour Melman, is that "[t]he Permanent War Economy of the United

12. Schlesinger I, *supra* note 6.

13. *Id.*

14. Arthur Schlesinger, Jr., *The Immorality of Preventive War*, LOS ANGELES TIMES, Aug. 26, 2002, reprinted in History News Network, <http://hnn.us/articles/924.html> [hereinafter Schlesinger II].

15. *Id.*

16. See Byrd, *supra* note 8; Schlesinger I, *supra* note 6.

17. See Schlesinger I, *supra* note 6.

18. *Id.*

19. See Schlesinger II, *supra* note 14.

20. See Press Release, White House Historical Association (Fall 1998), http://www.whitehousehistory.org/10/subs/images_archives/journal4prerelease.pdf.

States has endured since the end of World War II in 1945” and, indeed, “[s]ince then the U.S. has been at war—somewhere—every year, in Korea, Nicaragua, Vietnam, the Balkans, Afghanistan—all this to the accompaniment of shorter military forays in Africa, Chile, Grenada, Panama.”²¹ Like Melman, Sidney Lens refers to “permanent war,”²² Carl Boggs to “militarism,”²³ and Chalmers Johnson to the “sorrows of empire.”²⁴ In their classic study of America’s postwar economy, Paul Baran and Paul Sweezy identify defense spending as crucial to the maintenance of “monopoly capital” itself.²⁵ In any event, when you add it all up, something has got to give. It simply is not possible for a country virtually never to be attacked, go to war only when attacked, and to be constantly at war. The weak link here is the part about going to war only when attacked. It is true that America has at least had the option of being isolationist throughout most of its history because it is a big country, bounded by two large oceans, and has thus been relatively safe, at least until recently, from foreign navies or the armies of God. It is also true that the U.S. has been almost constantly at war with someone somewhere for the past sixty years. To suggest that going to war before the fight has a chance to come to you is somehow un-American, however, or more politely is “against the American grain,” is just not supported by the historical record.²⁶

PERMANENT WAR

Anyone who has seen Frank Capra’s compelling World War II-era documentary film series, *Why We Fight*, knows that there appeared to be some pretty compelling reasons for American soldiers being sent to fight in Europe, even though nobody in Europe had attacked the U.S. Capra’s argument was simple and straightforward, designed specifically for young soldiers about to be sent into combat: we fight now in order to prevent something a lot worse later. Who can forget Capra’s globe drenched in totalitarian domination—like a can of paint dumped on the free world—smothering

21. Seymour Melman, *They Are All Implicated in the Grip of a Permanent War Economy*, COUNTERPUNCH, <http://www.counterpunch.org/melman03152003.html> (Mar. 15, 2003).

22. See SIDNEY LENS, *PERMANENT WAR: THE MILITARIZATION OF AMERICA* (1987).

23. See CARL BOGGS, *MASTERS OF WAR: MILITARISM, AND BLOW BACK IN THE ERA OF AMERICAN EMPIRE* (2003).

24. See CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2004).

25. See PAUL A. BARAN & PAUL M. SWEEZY, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* (1966).

26. See LENS, *supra* note 22; BOGGS, *supra* note 23; JOHNSON, *supra* note 24; BARAN & SWEEZY, *supra* note 25.

our rights and liberties under a flood of fascist conquest? Not exactly “a wonderful life” to look forward to—so that’s why we fight.²⁷

Not just Korea and Vietnam, but the whole of the Cold War was fought not in self-defense, conventionally understood, but to prevent or preempt the communists from gaining a foothold in the Western Hemisphere (Cuba), or another foothold in the Western Hemisphere (Nicaragua), or to try to keep that first domino from falling (China today, Japan tomorrow), or the second (Vietnam, then Laos and Cambodia), or to prevent our allies from realizing we could not be trusted to keep our word or our international commitments. Americans were prepared to do whatever we had to abroad, now, in order to prevent being forced to live under the communist jackboot, at home, later. One of the last great theatrical events of the Cold War was the costly ABC television miniseries, “Amerika,” which not only lost twenty million dollars but also somehow failed to explain how the Russians were able to take over the U.S. without a fight.²⁸ The part of the script where, finally, Americans take up arms in the actual defense of the homeland, of American territory—a real war rather than more of the same endless worldwide preemptive skirmishing—was simply lost, or redacted, or erased, like the famous 18.5 minute gap in Richard Nixon’s tapes. Whatever else the doctrine of preemption or preventative war may be it is not, as Senator Byrd described it, revolutionary.²⁹ And, contrary to Arthur Schlesinger, it is not something invented by a former owner of the Texas Rangers baseball team.

The point, obviously, is not that the doctrine of preemption is moral or legal or even necessary—just that it is neither new nor something foreign to the American experience. Despite their recent potshots at Bush administration foreign policy, Byrd and Schlesinger know this perfectly well. Senator Byrd, after all, was a supporter of the Vietnam War in spite of the fact the Vietnamese had not landed sampans on Redondo Beach.³⁰ Byrd, like strategic policy planners in the Johnson and Nixon administrations, justified the brutal American war in Southeast Asia as a mission to prevent Vietnam, and then its neighbors, from falling to communism. Secretary of State, Dean Rusk, described the Vietnamese as merely “stalking horses” for Red China. Never mind the fact, as it turned out, that the only domino to fall after Saigon

27. See JOSEPH MCBRIDE, FRANK CAPRA: THE CATASTROPHE OF SUCCESS (St. Martin’s Griffin 2000) (1992).

28. See Anthony Chase, *Historical Reconstruction in Popular Legal and Political Culture*, 24 SETON HALL L. REV. 1969, 2009–11 (1994).

29. Byrd, *supra* note 8; see also Paul J. Nyden, *Byrd Questions War Spending Request*, THE CHARLESTON GAZETTE, Sept. 23, 2003, <http://www.commondreams.org/headlines/03/0923-12.htm> (last visited Mar. 27, 2004).

30. *Id.*

was the genocidal regime of Pol Pot in Cambodia, to which the Vietnamese communists mercifully put an end.³¹

Schlesinger warned readers of the Los Angeles Times, in 2002, that by “using his weaponry, [Saddam] Hussein would give the U.S. president his heart’s desire: a reason the world would accept for invading Iraq and enforcing ‘regime change.’”³² He also alerted members of Britain’s Royal Institute of International Affairs in 1998 to the fact that, in the U.S., the “isolationist impulse has risen from the grave in what has always been its essential programme - unilateralism.”³³ Thankfully, Charles William Maynes, joining Schlesinger at Chatham House in 1998, assured the Royal Institute that “no country in history has been able to maintain a hegemonic position without a degree of ruthlessness in its international policies that would be profoundly distasteful to the American people.”³⁴ Distasteful to the American people, perhaps, but not to Arthur Schlesinger, not when in government.

As an assistant to President Kennedy, Schlesinger was much less skeptical of unilateralism, the doctrine of preemption, and “regime change.” Although Cheddi Jagan, the socialist Prime Minister of Guyana, met personally with Kennedy in Washington and assured him that Guyana had no interest in becoming a Russian base, Schlesinger nevertheless advised the President, as Jagan later recalled, “that the way to remove from the government my party, which had won three successive elections, was to change our traditional first-

31. See Nyden, *supra* note 29. “Byrd again referred to the Vietnam War, which he supported at the time.” *Id.*

But who was the aggressor in Vietnam The Sino-Soviet split became so evident by the mid-1960s that even the most militant Cold Warriors had to take notice. Perhaps the “enemy” was China, and Dean Rusk conjured up the frightening image of a billion Chinese armed with hydrogen bombs.

John Garry Clifford, *Vietnam in Historical Perspective* (1975), excerpted from John Gary Clifford, *Change and Continuity in American Foreign Policy Since 1930*, in *PATHS TO THE PRESENT: INTERPRETIVE ESSAYS IN AMERICAN HISTORY* (James I. Patterson ed., 1975), http://www.ecfs.org/projects/fieldston57/since40/units/unit4/supplements/cliff_vietnam.html (last visited Mar. 27, 2004). “Containment continued during the 1960s, when the Kennedy and Johnson administrations escalated US military intervention against the advance of Vietnamese communism, which they believed was a stalking-horse for Chinese imperialism in Southeast Asia.” Jeffrey Record, *Thinking About China and War*, AEROSPACE POWER J., <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj01/win01/record.html> (last visited Apr. 4, 2004). See generally GABRIEL KOLKO, *ANATOMY OF A WAR: VIETNAM, THE UNITED STATES, AND THE MODERN HISTORICAL EXPERIENCE* (The New Press 1994) (1985).

32. Schlesinger II, *supra* note 14.

33. Arthur M. Schlesinger, Jr., *Unilateralism in Historical Perspective*, in *UNDERSTANDING UNILATERALISM IN AMERICAN FOREIGN RELATIONS* 18, 24 (Gwyn Prins ed., 2000).

34. Charles William Maynes, *Two Blasts Against Unilateralism*, in *UNDERSTANDING UNILATERALISM IN AMERICAN FOREIGN RELATIONS* 30, 39 (Gwyn Prins ed., 2000).

past-the-post district electoral system.”³⁵ In the event, it was the Central Intelligence Agency that did the heavy lifting in removing Jagan’s government, but Schlesinger seemed much less concerned, at that time, about unilateral “regime change” than now.³⁶ Schlesinger’s own account of these events, in his memoir of the Kennedy presidency,³⁷ does not differ materially from that of Jagan, a democratically-elected national leader who lost his job because of an American wish to preempt any possibility of his moving farther to the left, down the road.³⁸ Although Arthur Schlesinger, in 2003, found rather thin the Bush/Rumsfeld case for Iraq’s representing an imminent threat to the U.S., there has of course never been even a remote possibility that Guyana could launch a military strike against the U.S.³⁹ But for psychotic cult leader Jim Jones, most Americans would probably never have heard of Guyana. Nevertheless, whatever eventuality was to be prevented, even John F. Kennedy believed in the doctrine of preemption.

ANTICIPATORY SELF-DEFENSE

More rigorously if less accessibly, debate over the legitimacy of preemptive war is fought out by international lawyers within the doctrinal terrain of what is called “anticipatory self-defense.”⁴⁰ Arthur Schlesinger, who has at least heard of the term, proves once again that a little knowledge can be a dangerous thing. “The president has adopted a policy,” warns Schlesinger, “of ‘anticipatory self-defense’ that is alarmingly similar to the policy that imperial Japan employed at Pearl Harbor on a date which, as an earlier American president said it would, lives in infamy.”⁴¹ This from the

35. Cheddi Jagan, *Is Guyana to be Another Vietnam?* (1968), at <http://www.jagan.org/articles2i.htm> (last visited Mar. 27, 2004).

36. Arthur Schlesinger, Jr., *Unilateral Preventative War: Illegitimate and Immoral*, LOS ANGELES TIMES, Aug. 21, 2002, <http://www.ratical.org/ratville/CAH/UPW1aI.html>; see ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 774–79 (1965) [hereinafter SCHLESINGER III].

37. See SCHLESINGER III, *supra* note 36.

38. See CHEDDI JAGAN, THE WEST ON TRIAL: MY FIGHT FOR GUYANA’S FREEDOM (1966); JOHN PLATTS-MILLS, MUCK, SILK AND SOCIALISM: RECOLLECTIONS OF A LEFT-WING QUEEN’S COUNSEL 399–417 (2001).

39. Schlesinger I, *supra* note 6.

40. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 71–79 (1993); YEHUDA Z. BLUM, FOR ZION’S SAKE 174–89 (1987); RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 136–50 (1989); JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 115–17 (1894); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 609–10 (6th ed. 1910).

41. Schlesinger I, *supra* note 6.

taciturn, bow tie-wearing, Democratic historian of the New Deal? When British Labour Party leader Tony Benn pushed his loyal phalanx of supporters further to the left, in spite of the fact that Margaret Thatcher, the “Iron Lady,” and her right-wing conservative colleagues waited menacingly just over the horizon, impatient to bury the coal miners’ union along with the rest of the British welfare state, historian Eric Hobsbawm suggested the wily Benn had “lost [his] marbles.”⁴² American anti-war protestors from the 1960s, instructed at the time by cautious liberals like Professor Schlesinger, never to employ sheer hyperbole in their denunciation of American policy (like referring to President Lyndon Johnson as a “fascist pig”), must now be shaking their heads in disbelief as a roller derby of cat’s-eyes, boulders, and steely shooters come careening off Schlesinger’s atrophied brow.

First, the Japanese did not attack Pearl Harbor in anticipation of an imminent attack on Japan by the U.S. Navy—indeed the “reasoning of Japan’s leaders was that the United States had little effective power in the western Pacific.”⁴³ More than that, Japan’s wartime goals were primarily economic. The Japanese “strategy was to carve out an area within which economic self-sufficiency would be possible and to defend it until the United States tired of war.”⁴⁴ So the legal doctrine of anticipatory self-defense could not be made to fit the facts in the Pacific in 1941. Second, Schlesinger would have been on firmer ground had he attributed the anticipatory self-defense argument to the Nazis: Hermann Göring, in fact, sought to justify at Nuremberg the German occupation of the Rhineland by claiming it constituted merely “mobilization measures in . . . case of an attack on Germany.”⁴⁵ Germany’s invasion of Europe, in Göring’s account, was carried out “from the very beginning only in the interest of defense.”⁴⁶ Third, the issue is not whether the anticipatory self-defense argument can be misused—Schlesinger, a staunch defender of Arkansas lawyer, Bill Clinton, should know by now that any legal argument can be misused. But that is not a reason for abandoning the law. The issue is whether in a given set of circumstances, a state’s use of force meets the requirements of an anticipatory self-defense argument. Fourth, Schlesinger not only fails to convey a sense of what rules govern the doctrine’s application but makes it sound as if it is just another excuse for a policy of “anything goes.” That is not true. Finally, one would never glean from Schlesinger the knowledge that anticipatory self-defense doctrine’s

42. TONY BENN, *THE END OF AN ERA: DIARIES 1980–90*, at 250 (Ruth Winstone ed., 1992).

43. JOHN K. FAIRBANK ET AL., *EAST ASIA: TRADITION AND TRANSFORMATION* 721 (1973).

44. *Id.* at 720.

45. MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945–46*, at 128 (1997).

46. *Id.* at 129.

basic formulation not only comes from American jurisprudence but is actually more than 150 years old.

"The classic illustration of this right of anticipatory self-defense," observe Anthony Arend and Robert Beck, "was the *Caroline* case."⁴⁷ Leaving the facts of the case to one side, it was Secretary of State Daniel Webster, who in 1842 in a note to Britain's Lord Ashburton, coined the language that became the test for when a state can legitimately engage in anticipatory self-defense.⁴⁸ In short, "customary international law recognized a right of anticipatory self-defense provided the conditions of necessity and proportionality were met."⁴⁹ Philip C. Jessup makes the interesting point that the *Caroline* test "is obviously drawn from consideration of the right of self-defense in domestic law . . . [but] [i]t is an accurate definition for international law."⁵⁰ And just as an individual, under domestic criminal law, need not wait until he has been killed before he is legally allowed to defend himself against imminent deadly force, states need not wait until they have been bombed or their borders transgressed before they initiate a proportionate defense. This point of law has frequently been echoed in comments by President Bush to the effect that the U.S. need not wait for an attack like the one on the World Trade Center in order to be able to defend itself against terrorism.⁵¹

THE END OF HISTORY

Beyond his rejection of preemption/anticipatory self-defense, there was another extraordinary claim made in Senator Byrd's February 2003 anti-war speech.⁵² He argued that unilateral American action against Iraq violated international law and the U.N. Charter.⁵³ It is, in fact, the decision by the Bush administration to invade Iraq without prior approval from the U.N. Security Council—indeed, in the face of a certain French veto—that has led

47. AREND & BECK, *supra* note 40, at 72.

48. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 42–43 (1963); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105–06 (2000); I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, PEACE 298 (H. Lauterpacht ed., 8th ed. 1955).

49. AREND & BECK, *supra* note 40, at 72.

50. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 164 (1948).

51. See Robert Kagan, *On to Phase II*, WASH. POST, Nov. 27, 2001, <http://www.ceip.org/files/publications/wpost112701.asp>.

Saddam and his regime pose a direct and unacceptable threat to the United States. And therefore the United States has the right to take preemptive action. America need not wait 'for terrorists to try to strike us again,' the president said recently. We can take 'the fight to the enemy.'

Id.

52. Byrd, *supra* note 8.

53. *Id.*

so many administration critics to argue that the U.S. has effectively buried the most important international organization ever created. To adequately evaluate this argument, it will be necessary to situate recent American history in its proper relationship to international law and the practice of the U.N. And to do that, it is essential to briefly survey the background of world politics, if you will, and the contours of modern American foreign policy.

If the U.S. found itself almost continuously at war, from Pearl Harbor through the fall of communism, the end of the Cold War suggested the possibility that a very different kind of world was just over the horizon. Everyone discussed how best to spend the "peace dividend." When the U.N., with most of its member states on the same page, launched a military intervention in Kuwait in 1991, it was the U.N.'s first real military mission since the Korean War. When the effort succeeded, and Iraqi troops were ejected from Kuwait, it seemed a new day had dawned. The U.N., it was argued, had finally fulfilled the dream of San Francisco and Dumbarton Oaks. Former Reagan administration advisor, Francis Fukuyama, went so far as to suggest this new world represented, perhaps, "the end of history."⁵⁴ With both fascism and communism decisively defeated by western liberalism by the close of the twentieth century, grand theorists might be forgiven for having jumped to the conclusion that seemingly intractable conflicts dominating the past century had finally been resolved.

Extending an inchoate, certainly uneven, human rights doctrine, however, into Yugoslavia at the point of a gun, the Clinton administration caused some to fear that America could not necessarily be trusted to use its relatively uncontested, world class military power wisely. "In the midst" of NATO's intervention in Yugoslavia, Charles William Maynes recounts, he "had the occasion to ask the Secretary-General of NATO in public to cite the source for the legality of NATO's decision to attack another country."⁵⁵ The only response he got was that members of NATO had endorsed the action.⁵⁶ Worse still, it was believed the U.S. might have bombed a pharmaceutical plant in Sudan, certainly based upon flimsy intelligence, in an effort to distract domestic focus from the President's personal political problems. When President Clinton unleashed a bombing campaign against Baghdad on the eve of a Congressional vote to impeach him, a chorus of critics accused the President of "wagging the dog"—that is, of manufacturing a military crisis abroad to divert attention from the Lewinsky scandal.⁵⁷ "I would like to

54. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2d ed. 1993).

55. Maynes, *supra* note 34, at 36.

56. *Id.*

57. See Anthony Chase, *Elections and Party Politics*, in *COLUMBIA COMPANION TO AMERICAN HISTORY ON FILM* (Peter C. Rollins ed., 2004).

think that no American president would even consider using the military to help him remain in office,” observed House Majority Leader Richard Armey, a Texas Republican, but he continued, “the fact that Americans are expressing these doubts shows that the president is losing his ability to lead.”⁵⁸

Operating under the umbrella of NATO peacekeeping, the U.S. did not seem to believe it needed U.N. Security Council permission to deploy force against the Serbian regime of Slobodan Milosevic. The desire to extend American might, however, has increased exponentially with the terrorist attacks of September 11, 2001. Clearly prepared to use whatever force might be required, the U.S. invaded and conquered first Afghanistan, then Iraq, in quick succession. Despite majority opposition within the Secretary Council and warnings from Secretary General Kofi Annan that the U.N. might soon follow the League of Nations into the dustbin of history, the U.S. invaded Iraq, backed only by a “coalition of the willing,” and briefly raised an American flag over Baghdad the day the capital city was taken. In June 2003, the British Broadcasting Company reported that, based on polling results, eighty-one percent of Russians and sixty-three percent of the French opposed the U.S. attack on Iraq.⁵⁹ In both Jordan and Indonesia, the U.S. was regarded as more dangerous than al-Quaida, and in nations as diverse as Canada, Brazil, France, and South Korea, the U.S. was perceived to be more dangerous than Iran, Syria, or both.⁶⁰ Germans, according to the authoritative news magazine, *Der Spiegel*, considered George Bush to be more dangerous to world peace than Saddam Hussein.⁶¹

While the U.S. occupation of Iraq dragged on during the summer of 2003 and American soldiers were killed in sniper or mortar attacks, debate raged on both sides of the Atlantic over why no weapons of mass destruction had yet been found and whether President Bush and British Prime Minister Tony Blair had leveled with trusting citizens, prior to launching hostilities, about the actual threat to Atlantic security posed by Saddam Hussein. If Democratic Senator John Kerry called for “regime change” in the U.S. during the war, another Democrat (and, briefly, presidential hopeful) Senator Bob Graham hinted that impeachment might be appropriate if Bush could be

58. Bill Sammon, *Clinton Unleashes Missiles on Iraq, Stalling House Vote to Impeach Him*, WASH. TIMES, Dec. 17, 1998, (quoting Richard Armey), http://www.mega.nu:8080/amp/stonewall_boguswar.html.

59. *Poll Suggests World Hostile to US* (BBC TWO news broadcast, June 16, 2003), <http://news.bbc.co.uk/2/hi/americas/2994924.stm> (last visited Mar. 27, 2004).

60. *Id.*

61. *Umfrage Zum Weltfrieden: Deutsche halten Bush für gefährlicher als Saddam*, SPIEGEL ONLINE POLITIK, Feb. 14, 2003, at <http://www.spiegel.de/politik/ausland/0,1518,235071,00.html> (last visited Mar. 27, 2004).

shown to have intentionally lied about Iraq's nuclear threat in his State of the Union address.⁶² Fletcher School professor, Michael J. Glennon, writing the lead essay in the Summer 2003 issue of *Foreign Affairs*, announced what then seemed increasingly obvious: the U.N. experiment was over.⁶³ "With the dramatic rupture of the UN Security Council," wrote Glennon, "it became clear that the grand attempt to subject the use of force to the rule of law had failed."⁶⁴

While the subsequent capture of Saddam Hussein by U.S. forces provided the Bush administration a brief respite from criticism of post-war U.S. policy in Iraq, it did not lead to any sort of let up in the mounting U.S. death toll. American service men and women continued to be killed almost every day by an Iraqi resistance that no longer appeared dependent upon Saddam Hussein for either strategic planning or inspiration. Turning his father's late-term political situation upside down, George W. Bush and his advisors hoped that an improving economy could still snatch victory from the jaws of defeat, that domestic success could trump the perception of international failure and thus secure a Republican return, by however narrow a margin, to the White House for another four years. But with continued European refusal to significantly aid the effort to build "democracy" in Iraq coupled with American denial of reconstruction contracts to private firms from nations that President Bush regarded as having earlier blocked America's path to war, the unilateralist tone to American foreign policy remained. Unchecked by the U.N. and seemingly indifferent to international law, the U.S. had become, if not a rogue state then, at least, a cowboy state, feared and disliked by many, including some former allies, around the globe. It was this state of affairs that former-Secretary Bob Rubin hoped would be seriously debated in the 2004 presidential election campaign.

GRAND STRATEGY

Was there a method to what, at least, several Democratic presidential contenders and some leading European diplomats regarded as a form of madness? Was there any sort of political or historical backdrop against which American foreign policy in the new century could be made to make some kind of sense or reveal a plan or strategy, of sorts? And what should be

62. Glen Johnson, *Kerry Says US Needs Its Own 'Regime Change'*, BOSTON GLOBE, Apr. 3, 2003, <http://www.commondreams.org/headlines03/0403-08.htm> (last visited Mar. 27, 2004); *Graham Defends Argument for Impeachment*, CNN.COM, July 27, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/07/27/graham.impeach/>.

63. See Glennon, *supra* note 5.

64. *Id.* at 16.

the proper relationship, anyway, between foreign policy goals and international legal rules?

Public international law is a norm, a set of standards, rules for governing the conduct of states in their relations with other states.⁶⁵ That is why it is alternatively referred to as international law or “the law of nations.”⁶⁶ But it is not a political strategy, a set of goals and purposes animating foreign policy. International law is, rather, a framework within which a strategy is mounted. Liddell Hart, Richard Rosecrance, and Arthur A. Stein describe grand strategy as a military policy combined with other elements of national strength. Yet they go further and, relying on strategic theorists like Richard Howard and Paul Kennedy, argue that grand strategy encompasses “the adaptation of domestic and international resources to achieve security for a state.”⁶⁷ They specifically underline the “necessity of including domestic politics and economics in any broad calculus of grand strategy.”⁶⁸

Consider the domestic economic and political angle first. One of the most fruitful theories of social development was given comprehensive statement in the work of historical sociologist Barrington Moore. In his landmark, *Social Origins of Dictatorship and Democracy*, Moore sketches “with broad strokes the major features of each of the three routes to the modern world.”⁶⁹ The first route “combined capitalism and parliamentary democracy after a series of revolutions: the Puritan Revolution, the French Revolution, and the American Civil War.”⁷⁰ One of the distinguishing aspects of these early modernizers—Britain, France, the U.S.—was the strength of “a group of the middle class,” or as economist Kohachiro Takahashi put it, “the class of free and independent peasants and the class of small-and middle-scale commodity producers.”⁷¹ This is the route to modern industrial society that Moore calls that “of bourgeois revolution, a route that England, France, and the United States entered at succeeding points in time with profoundly different societies at the starting point.”⁷² Moore is quick to point out that the second path to modernization “was also a capitalist one, but, in the absence

65. Public International Law, International Committee for Human Rights, <http://www.ichr-law.org/english/expertise/areas/pil.htm> (last visited Apr. 4, 2003).

66. *Id.*

67. *Beyond Realism: The Study of Grand Strategy*, in *THE DOMESTIC BASIS OF GRAND STRATEGY* 4, (Richard Rosecrance & Arthur A. Stein eds., 1993).

68. *Id.* at 5.

69. BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 413 (1966).

70. *Id.*

71. Kohachiro Takahashi, *A Contribution to the Discussion*, in *THE TRANSITION FROM FEUDALISM TO CAPITALISM* 68, 94 (Rodney Hilton, ed., 2d ed. 1976).

72. MOORE, *supra* note 69.

of a strong revolutionary surge, it passed through reactionary political forms to culminate in fascism.”⁷³ Here, Moore is describing the characteristic development of Germany and Japan. And following Max Weber’s “conflict in the two ways of capitalist activity,” Takahashi also contrasts social development in Western Europe with that of Prussia and Japan where “the erection of capitalism under the control and patronage of the feudal absolute state was in the cards from the very first.”⁷⁴ The third and final route observed Moore, in 1966, “is of course the communist one.”⁷⁵

In *Law & History, The Evolution of the American Legal System*,⁷⁶ the reader will find a much more systematic and fully explained rendition of this particular approach to history—the periodization over three centuries of an unfolding dialectic of bourgeois transformation, the map of how a particular approach to modern industrial society worked itself out in legal terms in the U.S. What is important here, however, is simply to stress the progressive and liberal capitalist nature of American society and politics, the particular form taken in this country by what Rosecrance and Stein refer to as the domestic bases of grand strategy. Given American liberal, rather than authoritarian, capitalist “path dependence,” how did this domestic orientation shape American grand strategy over the past century?⁷⁷

Immanuel Wallerstein characterizes the First and Second World Wars as part of one long conflict: “the end of the First World War represented far more a truce in a ‘thirty years’ war’ than a definitive victory for the Allies.”⁷⁸ “Germany had lost a battle in its struggle with the US to be the successor hegemonic power to Great Britain” but, Wallerstein concludes, “it had not yet lost the war.”⁷⁹ Two decades later, the U.S. entered into a strategic alliance with the Soviet Union in order to defeat fascism. In so doing, the U.S. adopted a “left of center” international position.⁸⁰ “When Germany moved definitively ‘right’ under the Nazis,” asserts Wallerstein, “it isolated itself diplomatically and allowed the US to construct the worldwide diplomatic ‘popular front’ which would ultimately make possible final victory in the

73. *Id.*

74. Takahashi, *supra* note 71, at 94–95.

75. MOORE, *supra* note 69.

76. ANTHONY CHASE, *LAW AND HISTORY: THE EVOLUTION OF THE AMERICAN LEGAL SYSTEM* (1997).

77. See W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994).

78. Immanuel Wallerstein, *The USA in the World Today*, in *THE POLITICS OF THE WORLD-ECONOMY* 69 (1984).

79. *Id.*

80. *Id.* at 71.

'thirty years' war' of 1914-45."⁸¹ More recently, constitutional lawyer Philip Bobbitt has similarly regarded the First and Second World Wars as encompassed within one "Long War," a war that "could not have ended so long as fascism was alive in a great power."⁸² "Resolute actions might have deterred Germany for a time; absent such actions,"⁸³ in Bobbitt's view, "the temporary stalemate of Versailles was bound rapidly to end in violence."⁸⁴ How different was the view from Washington during the years immediately following the Second World War—with fascism defeated (in fact, prosecuted in court) and communism on the rise in Asia and enjoying a newly-won prestige in Europe due to the central role played by communists in a range of bold, if rarely militarily significant, anti-fascist resistance movements during the war. In terms of the international political picture, argues Wallerstein, "the US emerged as the uncontested hegemonic power."⁸⁵ "Furthermore, there were no longer any significant 'rightist' governments among the core states."⁸⁶ Thus, grand strategy took another turn. "[T]he US," says Wallerstein, "quickly shifted therefore from being 'left of center' to being the leader of a 'free world' alliance against the world left."⁸⁷ So just as the United States had assumed a position "left of center" in the 1930s, when it became apparent that fascism would be the main enemy for the foreseeable future, the U.S. took up an international stance "right of center" once the fascist threat had been eliminated.⁸⁸

While in the sweep of history, the fall of communism in 1989 may still deserve to be categorized as "current events," it seems clear from the present vantage point that the twists and turns of American grand strategy have already found expression in the post-communist world. Turning the "reverse course" (as it was called when the U.S. occupation policy in postwar Japan shifted to the right) on its head, the U.S. positioned itself "left of center" after the disintegration of the Soviet Union, i.e., once the communist threat had been eliminated. The U.S. has gone to war three times since 1989: twice against Saddam Hussein's Iraq and once again Slobodan Milosevic's Yugoslavia. While Hussein called upon all Muslims to resist American imperialism's effort to destroy Islam and Milosevic, in fact, directed his "ethnic

81. *Id.*

82. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 37 (2002).

83. *Id.*

84. *Id.*

85. Wallerstein, *supra* note 78, at 71.

86. *Id.*

87. *Id.*

88. See generally CHASE, *supra* note 76, at 197–202.

cleansing” against the ethnically-Muslim Albanian Kosovars in Yugoslavia, the two regimes had something crucial in common, even beyond constituting totalitarian dictatorships: they were both ideologically neofascist. Historian Walter Laqueur, in his exhaustive annotation of sources on fascism, produces Saddam Hussein as the essential contemporary neofascist, and as mundane a source as an online student encyclopedia cites Saddam Hussein, along with France’s Jean-Marie LePen and Russia’s Vladimir Zhirinovskiy, as prominent examples of neofascist political leaders.⁸⁹ The latter reference adds to the neofascist list “the Serbian Radical Party, led by Vojislav Seselj.”⁹⁰ The Serbian Radical Party, supported by deposed Yugoslavian President, Slobodan Milosevic, sponsored paramilitary forces in the Bosnian war and is even farther to the right than Milosevic’s party. After receiving about a quarter of the votes cast in the autumn 2002 Serbian presidential elections, Seselj was indicted for crimes against humanity and jailed by the war crimes tribunal in the Hague. Nevertheless, at the end of December, 2003, Slobodan Milosevic “and another U.N. war crimes suspect [Vojislav Seselj] won seats in Serbia’s parliament as [the] extreme nationalist [Serbian Radical] party swept week-end elections.”⁹¹ If the U.S./NATO intervention in Yugoslavia managed to secure its main aim, the protection of Albanian Kosovars from genocidal brutality administered by the country’s Serb majority, it has clearly failed to dissuade the Yugoslavian people from endorsing the parliamentary politics of neofascist war criminals.

Identifying the fundamental domestic basis of American grand strategy, following Rosecrance and Stein, it seems clear the U.S. has employed conventional balance of power tools to defend the social and economic foundations of the liberal capitalist state. In a nutshell, American grand strategy over the past century can be characterized in terms of a shift to the left (combating imperial Germany at the front end of the Long War, making the world “safe for democracy”), a shift to the right (engaging the Red Army in Russia in 1918), a shift left (diplomatic recognition of the Soviet Union during Roosevelt’s New Deal and a wartime “popular front” to defeat fascism), a shift right (the Cold War), and finally, or at least most recently, another shift back to the left (America at war with neofascism in Eastern Europe and the

89. *Neofascism*, BRITANNICA CONCISE ENCYCLOPEDIA, <http://www.britannica.com/ebc/article?eu=409628> (last visited Mar. 27, 2004); WALTER LAQUEUR, *FASCISM: PAST, PRESENT AND FUTURE* (1997); Dusan Stojanovic, *Milosevic and Another Jailed War Crimes Suspect Win Parliamentary Seats*, SAN DIEGO UNION TRIB. (AP), Dec. 30, 2003, <http://www.signonsandiego.com/news/world/20031229-1738-serbia-elections.html> (last visited Mar. 27, 2004).

90. Stojanovic, *supra* note 89.

91. *Id.*

Middle East in the wake of communism's demise). Thus, a remarkable pattern begins to emerge. Of Barrington Moore's three roads to modern industrial society, the U.S. has rigorously adhered to the first, that of liberal capitalism. V. I. Lenin characterized bourgeois democracy as the best possible political shell for capitalism and America's grand strategy, with or without acknowledgement of Lenin, has certainly amounted to a consistent effort to hew that course, drawing further to the left when fascism, the option on the right, appeared ascendant and correspondingly further to the right when communism, the option on the left, appeared to be gaining strength.⁹² Once the century's various channels and currents were charted, steering the helm of state became a relatively straightforward process, well within the capacity of Republicans and Democrats alike.

INTERNATIONAL LAW

Grand strategy, of course, is sometimes capable of dictating a foreign policy well within the confines of international law, and always, in any event, stands in an important relationship to international law—but the two are not the same. Defining international law as “the rules of legitimate behavior for states,”⁹³ Philip Bobbitt argues that because international law helps to shape the political goals that grand strategy exists to serve, it is “among the first resources consulted in a crisis, and its treaties and treatises are among the last resources deployed when violence has ended and its consequences must be healed.”⁹⁴ Where, then, is international law to be found? The generally recognized sources of international law, authoritatively established in the charter of the World Court, the primary judicial organ of the international legal system sitting in The Hague, the Netherlands,⁹⁵ are: international conventions; international custom as evidence of a general practice accepted as law; general principles of law accepted by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of various nations.⁹⁶ Testifying to the relative stability of this legal regime, the

92. See MARK MAZOWER, *DARK CONTINENT: EUROPE'S TWENTIETH CENTURY* (1998); ERIC HOBBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991* (1994).

93. BOBBITT, *supra* note 82, at 356.

94. *Id.*

95. See LORNA LLOYD, *PEACE THROUGH LAW: BRITAIN AND THE INTERNATIONAL COURT IN THE 1920S* (1997); HOWARD N. MEYER, *THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS* (2002) (for the official World Court web page, see International Court of Justice, *Peace Palace, the Hague, the Netherlands*, <http://www.icj-cij.org/icjwww/igeneralinformation.htm>).

96. 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR, AND NEUTRALITY* 55–56 (Arnold D. McNair ed., 1926).

list of sources has remained unchanged since the World Court was founded, as the Permanent Court of International Justice, in 1922. In his "Report and Commentary" on the World Court project, published by the Carnegie Endowment in 1920, after listing these specific sources of international law, James Brown Scott provides a detailed examination of judicial decisions by which the law of nations had already been incorporated into the laws of England and the U.S., respectively. Although the international Advisory Committee of Jurists that drafted the World Court's charter worked long and hard to agree to the language adopted, eventually, as the American delegate to the Committee, former-Secretary of State Elihu Root, put it at the time: "Leg over leg the dog went to Dover."⁹⁷

This corpus of law has long been in the making, dating back to the work of the important Dutch writer, Hugo Grotius (1583-1645),⁹⁸ and to the Peace of Westphalia, whose adoption in 1648 signaled, in effect, that "the doctrine of sovereignty achieved 'codification.'"⁹⁹ The emergence of the sovereign state as the dominant political unit, at least in Europe, was a prerequisite to the rise of a modern international law, a set of legal rules and principles whose "persons" are sovereign states. To be sure, the "fact that Shakespeare preceded the birth of modern international law," as Theodore Meron reminds us, "does not mean that no broadly recognized rules applied, at least in principle, to nations' conduct of war."¹⁰⁰ In fact, it can be said that the gradual emergence of international law after the Peace of Westphalia represented a stage in the long process of development whereby principles applying to the conduct of war were transformed into the modern law of war.

For many, however, the transformation of principle into law, so far as international law is concerned, is more apparent than real. In what sense can the rules of international law be regarded as genuine law—or, at least, what is usually meant by the reference "law," the kind of statutory and case law with which we are most familiar? And how can law exist in the absence of any enforcement mechanism, especially without a police force, criminal courts, jails, and so forth? Even without these, international law still looks a good deal like conventional, i.e., domestic or municipal law. Consider a

97. JAMES BROWN SCOTT, *THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS* 48, 106–111 (1920), reprinted in 7 *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DIVISION OF INTERNATIONAL LAW PAMPHLET SERIES* 32–37 (2000).

98. See EDWARD DUMBAULD, *THE LIFE AND WRITINGS OF HUGO GROTIIUS* (1969); HUGO GROTIIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND THE LAW OF NATIONS* (A.C. Campbell trans., 1901).

99. AREND & BECK, *supra* note 40, at 16.

100. THEODOR MERON, *HENRY'S LAWS AND SHAKESPEARE'S WARS: PERSPECTIVES ON THE LAW OF WAR IN THE LATE MIDDLE AGES* 11 (1993).

concrete example: on July 25, 1998, the Kosovo Liberation Army ("KLA") abandoned its Llapushnik Prison Camp due to Serbian military forces retaking the area around the camp.¹⁰¹ A number of prisoners held in the camp were marched into a clearing in a nearby forest and eleven of them were shot and killed.¹⁰² Haradin Bala, Isak Musliu, and Agim Murtezi were accused of being responsible for these murders and, in February 2003, were arrested by KFOR forces.¹⁰³ The three detainees were transferred to the detention unit of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and two of them will be tried, like the Serb political leaders, Slobodan Milosevic and Vojislav Seselj, for their conduct in Bosnia.¹⁰⁴

Bala and Musliu are charged with having planned, instigated, ordered, or committed acts or omissions such as imprisonment, violence, and murder against Serb and Albanian civilians held in the Llapushnik camp.¹⁰⁵ Agim Murtezi's defense counsel, Stephane Bourgon, informed the ICTY that Mr. Murtezi was not the individual identified in the indictment and Murtezi was subsequently released.¹⁰⁶ This is a remarkable example of international law in practice where the elements of a conventional western legal system are clearly present (statutory rules, accusation, arrest, investigation, trial, punishment upon conviction) and, indeed, where some features are in play, in spite of the fact they might not be present in the standard legal process of many states. For example, Bala and Musliu, both members of the KLA, are being prosecuted for the same kind of infractions (crimes against humanity, violations of the laws or customs of war) as the Serb officials, Milosevic and Seselj. Murtezi was released because a careful investigation revealed he was the wrong man. And Fatmir Limaj, the KLA commander on whose orders Bala and Musliu allegedly relied, a member of Parliament and public figure, managed to leave Yugoslavia on a business flight before he could be arrested.¹⁰⁷ Thus can one identify elements of equality before the law and due process—even occasional common law's inadequacy of enforcement—that tend to characterize municipal legal systems. Why, then, must international law, "as law," receive such low marks?

101. Press Release, ICTY Office of the Prosecutor, Haradin Bala, Isak Muslu, and Agim Murtezi Transferred to the ICTY Following Their Indictment for Crimes Against Humanity and War Crimes, <http://www.un.org/icty/pressreal/2003/p729-e.htm> (Feb. 18, 2003).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Press Release, The Prosecutor v. Umjaetal: Agin Munezi Released Following the Withdrawal of the Indictment Against Him, <http://www.un.org/icty/pressreal/2003/p736-e.htm> (Feb. 28, 2003).

107. See Press Release, ICTY Office of the Prosecutor, *supra* note 101.

H.L.A. Hart, one of legal philosophers, does not think that it should.¹⁰⁸ Though reference to “international law” has been an accepted usage for almost two centuries, Hart nevertheless acknowledges that “the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists.”¹⁰⁹ But Hart believes that any comparison of international law with, and in contrast to, municipal law is misleading.¹¹⁰ War within the international system, he maintains, is not the same thing as violence between individuals, not least because “long years of peace have intervened between disastrous wars.”¹¹¹ This circumstance is without analog to municipal legal systems, and further, Hart regards as crucial that when international legal “rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts.”¹¹² Citing the immediate subordination of new states to international law and the similar case of states acquiring new territory or access to the sea, Hart rejects as “dogma,” with little respect for practical facts, the notion that “international obligations as self-imposed.”¹¹³ International law, in Hart’s view, can no more be reduced to mere moral exhortation than can the rules of municipal legal systems themselves.¹¹⁴

Writing in 1930, in the second edition of his *Grammar of Politics*, Harold Laski acknowledged, as H.L.A. Hart would a generation later, that “[t]he famous epigram that international law is not law at all has had a serious effect historically, both upon its prestige and its range of influence.”¹¹⁵ But Laski optimistically assessed the prospects for international law, suggesting that its rules “should be made universally binding through the power to have them definitely interpreted by a recognised tribunal.”¹¹⁶ It was the (then) new World Court which Laski hoped would constitute just such a tribunal, a court charged “with the task of consolidating international law, and revising its substance from time to time in the light of experience.”¹¹⁷ Thirty-years later, after a worldwide economic depression, another devastating world war and the onset of a cold war, Laski was still prepared to defend international law

108. H.L.A. HART, *THE CONCEPT OF LAW* 209 (2d ed. 1965).

109. *Id.*

110. *Id.*

111. *Id.* at 214.

112. *Id.* at 215.

113. H.L.A. HART, *supra* note 108, at 219.

114. *See generally id.* at 224, 227–32.

115. HAROLD J. LASKI, *A GRAMMAR OF POLITICS* 649 (1925).

116. *Id.*

117. *Id.* at 648.

“as law”—certainly by comparison with municipal law.¹¹⁸ “[T]o make the legal character of international law dependent upon its success in getting applied,” argued Laski, “is to apply to it canons of validity which the jurist does not dream of applying to national law.”¹¹⁹ Before considering whether U.S. interventions in Afghanistan and Iraq have, because of their transparent unilateralism, transgressed that international law in which Hart and Laski invested such confidence, it remains necessary, first, to juxtapose the development of the U.N. to the structure of international law.

THE UNITED NATIONS

The World Court has been sitting continuously in the Hague since the Court’s founding in 1922—with the exception, that is, of those years when the Nazis overran and occupied Belgium and the Netherlands. Describing the “creation of a nominally ‘new’ Court” after the defeat of the Nazis at the end of World War II, Howard Meyer states that “in doctrine, procedures, acceptance and application of precedent, facilities, and most staff personnel, even a few judges-to-be,” the post-war World Court was quite properly treated as a “re-created or revived Permanent Court of International Justice.”¹²⁰ Thus, the World Court has been and remains the world’s preeminent international legal institution. The U.N. organization, from the very beginning, was conceived more as a political than legal institution. To be sure, all legal institutions are “political” in the same sense that all reality is socially constructed. But the U.N. was not designed to replace international law or the World Court, and in that sense, is more about power politics than it is the law of nations. All of the major historical sources on the founding of the U.N. underscore complex problems of politics, not law, which had to be overcome, first by President Franklin Roosevelt, and subsequently by President Harry Truman and Secretary of State Edward Stettinius, so that agreement could eventually be reached at the U.N. founding conference in San Francisco.¹²¹

The U.N. Charter established the dominant position, within the organization, of the Security Council. The distinction alluded to here, between law

118. *Id.*

119. HAROLD J. LASKI, AN INTRODUCTION TO POLITICS 79 (1962).

120. MEYER, *supra* note 95, at 88.

121. See ANTHONY CLARK AREND, PURSUING A JUST AND DURABLE PEACE (1988); TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. (1997); EVAN LUARD, A HISTORY OF THE UNITED NATIONS, 1945–1955: THE COLD WAR YEARS (1982); STEPHEN SCHLESINGER, ACT OF CREATION, THE FOUNDING OF THE UNITED NATIONS (2003).

and power, between international rules and Security Council votes, was effectively drawn early on, in 1950, by John Foster Dulles. "It is not safe to give coercive power to the Security Council or to any other international body," Dulles argued, "unless that body is bound to administer agreed law."¹²² While world peace might be one of the goals of the U.N., the organization was not bound by international law. "At Dumbarton Oaks," observed Dulles, "the Big Three did not make any provision whatever for developing international law."¹²³ To be sure, Secretary of State Dulles was a right-wing politician, but the same could not be said of University of California, Berkeley's Hans Kelsen, described by Philip Bobbitt as the "leading figure of twentieth century jurisprudence."¹²⁴ In his treatise on the U.N., first published in 1950, Kelsen argues "[t]he competence of the Security Council coincides to a great extent with the competence of the entire Organisation."¹²⁵ This is just another way of saying what many others have said since: given the role assigned to the Security Council under the Charter and the veto system of voting on the Council itself, the latter very nearly *is* the U.N. in terms of effective power.¹²⁶ "The Security Council," concludes Kelsen, "has almost the character of a governmental body."¹²⁷ Crucially, Kelsen points out that the Security Council, as a governmental body answerable only to itself, is not bound to follow any regime of law and "[i]f a state can rely upon one of the five powers," i.e., one of the five permanent members of the Security Council (the U.S., Russia, France, Britain, and China), then "no action can be taken against it, even in case of open violation of the law. The veto right of the five permanent members of the Security Council may lead to a political system of more or less open clientage."¹²⁸ And whatever else it may be, a political system of open clientage should not be confused with a legal system governed by international rules.¹²⁹

These comments from Dulles and Kelsen, now more than fifty years old, apply as perfectly today as they did when written. After all, the U.N. Charter, effectively exempting the Security Council from the rule of law, has gone virtually unchanged since it was written. In fact, Mohammed Bedjaoui, a member of the Institut de droit international, recently-retired judge and former President of the World Court, opens his book, *The New World Order*

122. JOHN FOSTER DULLES, WAR OR PEACE 198 (1950).

123. *Id.*

124. BOBBITT, *supra* note 82, at 586.

125. HANS KELSEN, THE LAW OF THE UNITED NATIONS 279 (1950).

126. *Id.* at 275.

127. *Id.* at 276.

128. *Id.* at 275.

129. *Id.* at 274-79.

and the Security Council, by quoting John Foster Dulles: “The Security Council is not a body that merely enforces agreed law. It is a law unto itself.”¹³⁰ Judge Bedjaoui adds that Dulles “was giving utterance to a vague idea - never clearly articulated but none the less generally received or suffered - to the effect that the Security Council applies a law of its own, i.e. an autonomous body of rules, much of which the Council elaborates at its entire discretion.”¹³¹ Conservative columnist and television commentator, Laura Ingraham, in a book attacking the current U.N. and its supporters as elitist, heralds the late Senator Patrick Moynihan of New York for his courageous stand against America’s opponents while he was our U.N. Ambassador.¹³² Nevertheless, in spite of the fact that she is a graduate of the University of Virginia Law School and clerked at the U.S. Supreme Court, Ingraham does not once mention Moynihan’s defense of international law—indeed, she seems never to have heard of international law.¹³³

Secretary of State Robert Lansing, according to Moynihan, “believed in law, and as much on those grounds as any other was suspicious of *organization*.”¹³⁴ Extending Lansing’s distinction, Moynihan argues that “the interested reader wants to be clear that the question of international law is independent of the question of international organization. The League of Nations, like the United Nations later, was designed to enforce law, not to make it”¹³⁵ But as long as the Security Council is a “law unto itself,”¹³⁶ as Dulles put it, or in Bedjaoui’s phrase, “applies a law of its own,” then it will remain important to sharply distinguish international law and its enforcement from the work of international organizations like the U.N.¹³⁷

SELF-DEFENSE AND SELF-HELP

Calcovoressi, Wint, and Pritchard record there were

at the end of 1941 three separate theatres of war: first, the USSR where Leningrad was invested, German forces had come within sight of Moscow . . . secondly, the remnant of a war in the west

130. MOHAMMED BEDJAOUI, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL* 1 (Bernard Noble, trans., 1994) (emphasis omitted).

131. *Id.*

132. See LAURA INGRAHAM, *SHUT UP AND SING: HOW ELITES FROM HOLLYWOOD, POLITICS, AND THE UN ARE SUBVERTING AMERICA* (2003).

133. *Id.*

134. DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 40 (1990).

135. *Id.*

136. BEDJAOUI, *supra* note 130, at 1 n.1.

137. *Id.* at 1.

maintained by the Royal Air Force in Great Britain but pushed out into the Atlantic and waged chiefly by German U-boats and their pursuers; and thirdly, the Mediterranean where the Germans and Italians were trying to win North Africa.¹³⁸

Then, on December 7, the air force of the Empire of Japan bombed the American fleet at Pearl Harbor. Under these circumstances, it is perhaps not surprising that, as George Schwarzenberger observed at the time, the “suggestion has been put forward which is as startling in its simplicity as in its fallacy: International Law has broken down.”¹³⁹ There was a break down, of course, but it was one of international organizations, not international law. At no other time in history was it more important to understand the distinction between the two, later drawn by Dulles, Kelsen, and Moynihan, than at the end of 1941. “The deniers of International Law put up a seemingly formidable barrage of arguments,” continued Schwarzenberger, yet it was crucial to resist “this destructive and defeatist thesis” a thesis or argument that “attempts to establish an equality of status between the defenders of International Law and . . . their deadliest foes.”¹⁴⁰ It was Schwarzenberger’s intention, in his brief lectures on the subject during 1940-1941 at University College, London, to “show what weapons International Law can put in the hands of its defenders.”¹⁴¹

As we know, among those weapons were the armed forces of the U.S., the Soviet Union, Great Britain, and the other Allied Powers.¹⁴² Without the sanction of any international organization, but on behalf of international law’s enforcement, even against the most formidable of outlaw states, the Allies not only won the Second World War, but they placed many of those responsible for having waged aggressive war on trial in Nuremberg at war’s end.¹⁴³ Just as the Soviet Union and Great Britain had been attacked by Germany, and responded with military force, the U.S. was attacked by Japan, and international law clearly authorized these nations to employ unilateral action—or “self-help”—to defeat the Axis powers.¹⁴⁴ Twenty years later,

138. PETER CALVOCORESSI ET AL., *TOTAL WAR: CAUSES AND COURSES OF THE SECOND WORLD WAR* 113 (2d rev. ed. 1989).

139. GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS* 10 (1943).

140. *Id.*

141. *Id.* at 11.

142. See CALVOCORESSI ET AL., *supra* note 138.

143. KELSEN, *supra* note 125, at 274.

144. See, e.g., 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 115 (Arnold D. McNair ed., Longmans, Green & Co. Ltd. 1926) (1906). “A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and may then maintain that it

Schwarzenberger was somewhat less enthusiastic about the role of self-help within international law. "Although action of a State amounting to self-help may be within the law," Schwarzenberger wrote in 1962, "no certainty exists on the level of international customary law that it will keep within such limits."¹⁴⁵ This is, in a sense, a rather odd comment. While it is true of "action amounting to self-help," it is only true of self-help because it is actually true of all action in which states engage in the world. While state conduct may fall within the parameters of international law, there are no guarantees that states will confine their conduct within the limits of international law. In other words, Schwarzenberger's description of the nature of self-help would appear to be tautological. "In these circumstances," he adds, "the classification of intervention, reprisals, and war as measures of self-help or sanctions of international customary law is a euphemism. It provides a convenient legal cloak for action which more often than not belongs to the sphere of the rule of force."¹⁴⁶ Again, virtually every attempt to label state conduct, especially the deployment of military force, as justified by international law will amount to either a legal cloak (an intentional misrepresentation of the conduct) or a legal defense (an accurate characterization of law applied to facts). The only way to tell the difference between the two is by reference to the rules.

Some "self-help arguments" will correspond to the canons of international law whereas others will not. For example, the Nuremberg War Crimes Trial established that the Nazi argument, cited earlier, was wrong to the effect that the German offensive action in World War II was merely anticipatory self-defense. The British argument that in bombing Germany, England was engaged in self-defense, was a much more compelling argument under international law. After all, it was Germany that attacked England, not the other way around. The different positions of Great Britain and Germany, at the end of the war, with respect to international law and criminal responsibility, hinged on a good deal more than the stark reality that Britain was among

exercises by war nothing else than legally recognised self-help." *Id.* "Again, the very nature of international law, resting as it does largely on customary rules built up as rationalizations by jurists and statesmen on historical precedents, permitted governments to assert that armed coercion was a procedural method sanctioned by customary international law." *THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES* 684 (Herbert W. Briggs ed., 1938). While Security Council voting on issues of war and peace is extremely contentious, there is little or no disagreement as to a state's fundamental legal right to self-defense. The factual issues are the ones most hotly debated. See GRAY, *supra* note 48, at 85. "In theory it should always be possible to determine whether there was an armed attack and who is acting in self-defence. But in practice the situation is more complex." *Id.*

145. GEORGE SCHWARTZBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 39 (1962).

146. *Id.*

the victorious. It is true that if Hitler had won the war, German leaders would not have been put on trial at Nuremberg. But that fact does not somehow reduce to naught the real content of international law. Again, in his treatise on the U.N., Hans Kelsen writes that if an "international organization abolishes or restricts the principle of self-help established by general international law, it must fulfil two requirements."¹⁴⁷ The two requirements cited by Kelsen are that the organization itself must guarantee to settle the dispute between states that precipitates a use of force and must also enforce that settlement to the degree that an injured state's ability to protect itself is limited by the organization.¹⁴⁸ The U.N., Kelsen candidly acknowledges, does not meet either of these requirements.¹⁴⁹ Any organization, including the U.N., which simultaneously attempts to limit a state's ability to act in its own self-interest and yet does not satisfy the two requirements Kelsen outlines "constitutes, instead of an improvement, a dangerous deterioration of the legal status under general international law."¹⁵⁰

THE RULE OF LAW

If the U.S. (or any other state) must choose between the legal right of self-defense and fidelity to the U.N. Charter, then national security dictates violation of the charter or at least a policy of indifference to the organization and its pretense to authority. The right to self-defense is worthless if its exercise hinges on the meaning given to that phrase by each of the five permanent members of the U.N. Security Council.¹⁵¹ Since the Bush administration disagreed with France, and probably China and Russia as well, over whether invading Iraq was a legitimate exercise of American self-defense (or anticipatory self-defense), what it finally comes down to is a choice between the U.N. on the one hand and, on the other, what much of the rest of the world saw as recourse to self-help.¹⁵² Following Dulles, Kelsen, Moynihan, and others, the U.S. may in fact be faced with a choice between self-help enforcement of international law and abandonment of international law altogether out of deference to the U.N. and its political process. It is virtually impossible to square that political process with the rule of law. Kelsen

147. KELSEN, *supra* note 125, at 270.

148. *Id.*

149. *Id.*

150. *Id.*

151. *But see contra*, Jorge Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?* 34 CAL. W. INT'L L.J. 1, 9 (2003).

152. *Id.* at 21–22.

makes two points tending to buttress such a conclusion.¹⁵³ First, he asserts that the “veto right of the five permanent members of the Security Council, which places the privileged powers above the law of the United Nations, establishes their legal hegemony over all the other members of the Organisation and thus stamps on it the mark of an autocratic or aristocratic regime.”¹⁵⁴ Kelsen argues that we cannot fail to see a contradiction between such a regime and the purported goals of the U.N. The veto, in Kelsen’s view, cannot be reconciled with an institution that “presents itself ideologically as the crowning of a war waged for victory not only of arms but of ideals, especially the ideal of democracy.”¹⁵⁵ But Alexis de Tocqueville demonstrated a century earlier, in *Democracy in America*, that the rule of law and democracy are not equivalent, that majorities can in fact impose their will in spite of and at the expense of the rule of law.¹⁵⁶ And this view represents, of course, a fundamental precept of America’s “anti-majoritarian” constitutionalism.

It is Kelsen’s second point, however, which has such great import for the argument advanced here. He asserts that at the level of international relations,

the principle of equality must refer to the states as members of the community. This is the reason why the Charter proclaims as its first principle the sovereign equality of all its members. There is an open contradiction between the political ideology of the United Nations and its legal constitution.¹⁵⁷

The determination of international law, with reference not to law at all but to the votes of Security Council members, places the Council above the law. And the veto privilege held by five permanent members of the Council violates the very first principle of the rule of law: the sovereign equality of all citizens (in this instance states) before the law. The U.N. is thus, as Kelsen makes transparent, an Orwellian institution in which some states are more equal than others.¹⁵⁸ All law stands or falls with the credibility and effectiveness of the rule of law itself and even when equality before the law seems to mask a persistent inequality of social and economic power, formal juridical equality, nevertheless, constitutes a great advance over regimes of aristocracy, autocracy, serfdom, slavery, and terror.

153. KELSEN, *supra* note 125, at 274.

154. *Id.* at 276.

155. *Id.* at 277.

156. *Id.* at 276–77.

157. KELSEN, *supra* note 125, at 277.

158. *Id.*

Confirming this point from the philosophical side of things, Hegel had already warned, Franz Neumann reminds us, that though legal equality is purely formal, that is negative, it should not for that reason be discarded.¹⁵⁹ And from the historical side, reflecting on those inequalities that ultimately limit justice through legal formality, Edward Thompson adds:

But I do not conclude from this that the rule of law itself was humbug. On the contrary, the inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggle of the seventeenth century to the eighteenth, and a true and important cultural achievement¹⁶⁰

The reader may or may not agree with Sir Henry Maine's conclusion that since "all the modern progress of society seem[s] to be intimately connected with the completest freedom of contract, and in some way almost mysteriously dependent upon it, [we] should shrink from tampering with so powerful an instrument of civilisation."¹⁶¹ But the transition from status to contract, whose historical description made Maine famous, constitutes a real advance in the direction of both liberty and equality. In subordinating international law and the progressive regime of rules and values it represents to the archaic power politics of status voting on the Security Council, nations take a great leap backward in their foreign relations.

"By the middle of 1998," Blakesley, Firmage, Scott and Williams point out, "the Security Council has applied Chapter VII to authorize the collective use of force in Korea, and the Gulf War."¹⁶² It is frequently suggested that in San Francisco, in 1945, no one would have predicted that U.N. authorization of the use of force to keep or restore world peace would have taken place only twice in the next fifty years, and, in the event, separated by forty years. But in fact, such authorization might not have occurred at all. Only because the Soviets were boycotting the Security Council in 1950 did authorization of the use of force in Korea escape permanent member veto. And the authorization of force in the Gulf in 1990-1991 was nearly as strange. Like Korea, "[t]he 1990 Iraq/Kuwait conflict was another exceptional case," according to Christine Gray, "seen by many as marking a new role for the Security Coun-

159. See HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (1941); FRANZ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY* (1957).

160. E.P. THOMPSON, *WHIGS AND HUNTERS* 265 (1976).

161. SIR M.E. GRANT DUFF, *SIR HENRY MAINE: A BRIEF MEMOIR OF HIS LIFE* 90 (J. & J. Harper 1969) (1892).

162. CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1070 (5th ed. 2001).

cil and the start of a new legal order.”¹⁶³ With the return to American deployment of force without first seeking Security Council permission, first in Yugoslavia, then in Afghanistan and Iraq, the “new legal order[’s]” bright and shining moment faded quickly.¹⁶⁴ The U.N. use of force in Korea was a fluke, the Gulf War use of force was an “exceptional case” which, if a beginning at all, was merely the beginning of a war in Iraq which would end, a decade later, with the demise of the U.N. itself. Even during the Security Council’s debate over whether to authorize force in the Gulf in 1990, the Cuban representative pointed out that the U.N. could only authorize force under a multinational command structure. And once the bombs began falling on Baghdad, it was obvious that the Cubans had been right: the U.S., not the U.N., was calling the shots. And the war would end only when the Americans said it was over.

Still, in January 2004, Massachusetts Senator and Democratic Presidential contender John Kerry, appearing on the CBS News program, *Face the Nation*, contrasted Bush the Younger’s war in Iraq with that of Bush the Elder, emphasizing that President George Herbert Walker Bush, unlike his son, went to the U.N. with his war plan, secured the affirmative votes of Security Council permanent members (with China abstaining), and deployed a multinational fighting force under the aegis of the U.N.¹⁶⁵ It was actually more complicated than that. Iraq invaded Kuwait on August 2, 1990. Even prior to President Bush’s famous “[t]his will not stand, this aggression against Kuwait” statement to reporters on the South Lawn of the White House on August 5th,¹⁶⁶ Brent Scowcroft recalls a conversation he had with the President aboard a C-20 Gulfstream flight to Aspen, Colorado: “It was in discussion on the changes in his speech that it became obvious to me that the President was prepared to use force to evict Saddam from Kuwait if it became necessary”¹⁶⁷ Note that Scowcroft did not say the President was prepared to go the U.N.; he said the President was prepared to use force to evict Saddam Hussein from Kuwait.¹⁶⁸ In fact, under first the Reagan-Bush administration and then the Bush-Quayle administration, the United States considered withdrawing from the United Nations because its view of the United Nations had sunk so low.¹⁶⁹

163. GRAY, *supra* note 48, at 85.

164. *Id.*

165. *Face the Nation* (CBS News television broadcast, Jan. 4, 2004).

166. GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 333 (1998).

167. *Id.* at 318.

168. *See id.*

169. *See* DAVID ARMSTRONG ET AL., *FROM VERSAILLES TO MAASTRICHT: INTERNATIONAL ORGANISATION IN THE TWENTIETH CENTURY* (1996).

America's patience with the snapping and snarling underdogs in the General Assembly had run out. . . . This contributed hugely to the Reagan administration's tendency to regard the UN at best as 'a troublesome sideshow.' At worst, the US attitude came perilously close to the right-wing Heritage Foundation's belief that 'a world without the United Nations would be a better world'. [sic]¹⁷⁰

The President, however, was far from confident that the U.S. Congress would endorse his decision to send U.S. troops to Kuwait.¹⁷¹ He later recalled that after ordering the deployment of troops and equipment to the Gulf,

[t]he news of the troop increase, particularly its size, whipped up a new outcry in Congress and furious attacks on me that I had changed policy and decided to go to war without consultation. . . . The pundits and congressmen on the morning talk shows and the op-eds averred that I was wrecking my presidency.¹⁷²

Senator Patrick Moynihan, a personal friend of the President, was especially critical and warned Bush he would need both U.N. and Congressional approval before going to war.¹⁷³ Scowcroft had already determined that a Congressional vote in favor of war was too much to hope for.¹⁷⁴

Although we did explore options for the involvement of Congress, we never seriously contemplated invoking the War Powers Resolution.

We were confident that the Constitution was on our side when it came to the president's discretion to use force if necessary: If we sought congressional involvement, it would not be authority we were after, but support.¹⁷⁵

So where would authority for war come from?

"While I was prepared to deal with this crisis unilaterally if necessary," Bush candidly acknowledges, "I wanted the United Nations involved as part of our first response, starting with a strong condemnation of Iraq's attack on

170. *Id.* at 114.

171. BUSH & SOWCRAFT, *supra* note 166, at 396-97.

172. *Id.* at 396.

173. *Id.*

174. *Id.* at 397.

175. *Id.* at 398; *see also* HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS 138 (4th ed. 1994).

a fellow member.”¹⁷⁶ “UN action would [not only] be important in rallying international opposition to the invasion and reversing it,” but also the Security Council endorsement of the use of force could provide legal authority which the engagement of American military forces abroad otherwise would lack.¹⁷⁷ Although “the Cold War caused stalemate in the Security Council,” Bush admitted, “our improving relations with Moscow and our satisfactory ones with China offered the possibility that we could get their cooperation in forging international unity to oppose Iraq.”¹⁷⁸ Carefully playing their cards, Bush and Scowcroft managed to get from the U.N. Security Council the sort of official approval for war that they believed was beyond their reach in the Congress of the U.S.

After the President’s post-November election troop deployment, providing “an adequate offensive military option,”¹⁷⁹ and Secretary of Defense Dick Cheney’s statement to the Senate Armed Services Committee that he did “not believe the President requires any additional authorization from the Congress before committing U.S. forces to achieve our objectives in the Gulf,”¹⁸⁰ some members of Congress filed a suit in federal court seeking to enjoin the President from initiating an offensive attack against Iraq without first “securing a declaration of war or other explicit congressional authorization” for such action.¹⁸¹ And, in fact, on November 30, at a meeting of bipartisan congressional leaders, “President Bush made a pitch for a resolution backing the UN vote—which avoided the problem of asking Congress for authorization.”¹⁸² The plaintiffs, according to the court, alleged “in light of the President’s obtaining the support of the United Nations Security Council in a resolution allowing for the use of force against Iraq, that he is planning for an offensive military attack on Iraqi forces.”¹⁸³ That, of course, is exactly what the President was planning and, as it turned out, on January 12, 1991, the U.S. Congress—by a vote of 52-47 in the Senate and 250-183 in the House—managed to sign on to the war, after the decision-making was over and just in time for the bombs to start falling on Baghdad four days later.¹⁸⁴ Whether the Gulf War of 1990-1991 comported with either international law or America’s national interest is an important question, but one quite sepa-

176. BUSH & SCOWCROFT, *supra* note 166, at 303.

177. *Id.*

178. *Id.*

179. *Dellums v. Bush*, 752 F. Supp. 1141, 1143 (D.D.C. 1990).

180. *Id.* at 1151 n.31.

181. STEINER ET AL., *supra* note 175.

182. BUSH & SCOWCROFT, *supra* note 166, at 421.

183. *Dellums*, 752 F. Supp. at 1146.

184. BUSH & SCOWCROFT, *supra* note 166, at 446.

rate from the process by which the U.S. decided to go to war. The U.N. was used to provide a rubber stamp for a war fought without genuine congressional authorization. If this is the kind of political process Senator Kerry envisions as a model for decision-making in a Kerry or otherwise Democrat-White House, voters may wish to think twice about ever returning the party of Roosevelt and Kennedy to power.

KOREA

Finally, there is that other “exceptional case:” the Korean War. The war was exceptional for a reason with which everyone is familiar. In the summer of 1950, when the Korean War began, the Soviet Union was boycotting the Security Council and, as a consequence, when the Security Council voted to authorize the use of force in Korea to repel communist aggression, the Soviets were not there to veto the use of force resolution. By the time the Gulf War rolled around forty years later, it was the Russia of Gorbachev rather than Stalin that sat on the Security Council.

But the Korean War Security Council vote was exceptional for another reason, one which was not unrelated to the Soviet boycott in 1950. David Armstrong, Lorna Lloyd, and John Redmond write that “[a]n important legacy of the Korean War, and another consequence of US dominance of the Cold War UN, was the parody of Taiwan continuing to sit in China’s Security Council seat for 22 years after the establishment of the (Communist) People’s Republic of China (PRC) in 1949.”¹⁸⁵ Indeed, it was this “parody” or political charade that had caused the Soviets to boycott the Security Council in the first place. So, not only were the Russians not present to veto the use of force resolution in Korea, but the crucial Chinese vote was not cast on behalf of the Chinese people. China’s vote was not even cast on behalf of the Taiwanese. Fairbank, Reischauer, and Craig describe the arrival on Taiwan of a defeated Kuomintang, only a few years prior to the U.N. Korea vote:

Relations between the ruling minority from the mainland and the Taiwan-Chinese majority met an initial disaster in March 1947. The flagrant corruption of the Nationalist take-over authorities, before the arrival of most of their compatriots, provoked widespread demonstrations that were countered by the systematic killing of several thousand leading Taiwanese.¹⁸⁶

185. DAVID ARMSTRONG ET AL., *supra* note 169, at 72.

186. FAIRBANK ET AL., *supra* note 43, at 927.

So, the Chinese “Nationalists” in the Security Council did not represent China, nor did they even represent Taiwan, which was not, of course, a member of the U.N. On what theory of the rule of law could the Kuomintang-in-exile, a reactionary force that had only just invaded Taiwan, be placed in a position to approve or disapprove, veto or authorize, a use of force by the U.N.? What could this have to do with international law?

Although President Truman informed the American people in June 1950 that Korea had been invaded by the Communists, the truth was that Korea had been invaded by Koreans.¹⁸⁷ “Korea was a unitary and independent monarchy,” observes Arnold Offner, “that had long governed itself largely by Confucian doctrine . . . After waging war against China and Russia, the Japanese annexed Korea in 1910.”¹⁸⁸ Not surprisingly, “virtually all Koreans loathed the Japanese and their Korean collaborators.”¹⁸⁹ Once Japan was defeated at the end of World War II, U.S. officials, including Colonel Dean Rusk, recommended that Korea be divided into American and Soviet zones at the thirty-eighth parallel.¹⁹⁰ Although Stalin agreed to this proposal, the Soviets “quickly replaced Japanese officials and collaborators with Koreans—including non-Communist, moderate nationalists as well as exiles from Siberia.”¹⁹¹ What took place between the end of the war and 1950 was pitched battle between various forces seeking to shape the new Korean political order. While Offner claims “historian Bruce Cumings has stretched a point by denying legitimacy to the question of who started the Korean War,”¹⁹² Cumings nevertheless answers an even more important question: was what the U.S. confronted in 1950 a civil war?¹⁹³ International law forbade “outside” intervention in civil wars. Summarizing the “duty of non-intervention” and other limits imposed by international law on the ability of outsiders to interfere in the civil strife of other nations, Christine Gray adds that “[t]he status of these rules on forcible intervention in civil wars is no longer controversial; it was their application that led to fundamental divisions during the Cold War when the superpowers and others waged proxy wars in Africa, Latin America, and Asia.”¹⁹⁴

187. See ARNOLD A. OFFNER, *ANOTHER SUCH VICTORY: PRESIDENT TRUMAN AND THE COLD WAR, 1945–1953*, 367 (2002); see also BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* (1997).

188. OFFNER, *supra* note 187, at 348.

189. *Id.*

190. *Id.* at 350.

191. *Id.*

192. *Id.* at 367.

193. See OFFNER, *supra* note 187, at 367–68.

194. GRAY, *supra* note 48, at 52.

So what the U.N. Security Council authorized in 1950, in voting to deploy military force in response to North Korea's "unprovoked aggression," was not peace keeping or peace restoration, but in reality, a violation of international law.¹⁹⁵ In 1952, while the Korean War was still going on, Hans Kelsen pointed out that "[i]n the case of Korea the Security Council recommended to the members to take enforcement action involving the use of armed force, against 'forces from North Korea' or the 'authorities of North Korea,' which the Security Council did not consider to be the government of a state."¹⁹⁶ Kelsen then drew the obvious conclusion: "This implies that the war between North Korea and South Korea was a civil war within the 'Republic of Korea,'" in which case "the 'armed attack' upon the Republic of Korea by forces from North Korea could not be—as the Security Council determined—a 'breach of the peace,' that is to say, a breach of international peace."¹⁹⁷ Years later, when President Lyndon Johnson was escalating the Vietnam War, Vice-President Hubert Humphrey advised him that "[i]n Korea we were moving under United Nations auspices to defend South Korea against dramatic, across-the-border, conventional aggression. Yet even with those advantages, we could not sustain American political support for fighting Chinese in Korea in 1952."¹⁹⁸ Humphrey's words of caution are surreal in their stupidity and incomprehension. Vietnam was, in fact, a replica of Korea. Within a few short years of the inconclusive end to the Korean War, the U.S. illegally intervened in a civil war within Vietnam, a war without borders, and a war in which the dead, counted in tens of thousands, were overwhelmingly American and Vietnamese. If a Korean Memorial was dedicated in Washington D.C., alongside the much-visited Vietnam Memorial, it would have about the same number of soldiers' names etched into its surface. If Americans had understood the Korean War the way Robert McNamara eventually understood the Vietnam War, then the Vietnam War would never have happened. The U.N., in 1950, played a key role in securing that particular obfuscation of history.

But Korea was—except for the Gulf War—the one thing the U.N. Security Council supposedly did right, its one achievement. It was in fact an outlaw's enterprise. Adding insult to injury, or perhaps "delict" in the sense of a

195. See also BLAKESKY ET AL, *supra* note 162, at 1190–1205 (civil war in international law).

196. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 55 n.29 (Robert W. Tucker ed., 2d ed. 1966) (1952).

197. *Id.*

198. See ROBERT DALLEK, *HAIL TO THE CHIEF: THE MAKING AND UNMAKING OF AMERICAN PRESIDENTS* 122 (1996); see also ROBERT MCNAMARA, *IN RETROSPECT: THE TRAGEDY AND LESSONS OF VIETNAM* (1996).

criminal wrong, there was one further way in which the U.N. Security Council vote on Korea was exceptional. Without the Russians present and with one of Chiang Kai-shek's henchmen voting for China, the permanent membership of the Security Council was delivered to the "Korea invaded!" lobby. But that was not enough. Recall that the U.N. Charter, in 1950, required seven votes, including the concurring votes of all five Security Council permanent members (or, perhaps, four members if one was absent) for a resolution to be adopted. Security Council Resolution 83 of June 27, 1950, which called on U.N. members to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area" had received the votes of four permanent members, plus those of Ecuador and Norway.¹⁹⁹ Egypt and India abstained, and Yugoslavia had voted against the resolution.²⁰⁰ With one member of the Security Council remaining, the resolution still required a seventh affirmative vote to be adopted.²⁰¹ In an odd way, in a sense, a non-permanent member of the Security Council held a veto on this one particular vote. The seventh member was Cuba.

In the summer of 1950, the Cuban government's executive branch was under the leadership of Carlos Prío Socarrás, who had been elected President in 1948. He would serve in that capacity until 1952 when he was removed from office in a coup d'état, engineered by Fulgencia Batista.²⁰² The 1952 Cuban elections were cancelled, including the congressional race of Orthodox Party candidate Fidel Castro Ruz.²⁰³ Prío relocated to Miami after his ouster from office in Cuba and, in 1955, according to Robert Levine, Director of the Center for Latin American Studies at the University of Miami, "[a]nti-Batista exiles in Florida, led by former President Carlos Prío Socarrás," sent Fidel Castro and his compatriots in Mexico "enough money to purchase a barely seaworthy yacht, the *Granma*."²⁰⁴ Near the end of 1956, the soon-to-be legendary *Granma* arrived on Cuba's southern coast and was immediately fired upon.²⁰⁵ Of the eighty-two rebels aboard, only twenty survived, including Fidel Castro, his brother Raúl, and Ernesto "Che" Guevara.²⁰⁶ On October 14, 1957, U.S. Attorney General Herbert Brownell

199. U.N. SCOR, 4th Sess., 2d series, 474th mtg. at 5 (1950).

200. *Id.* at 5 n.12.

201. *Id.*; Global Policy Forum, *Elected Members of the Security Council 1946-Present*, <http://www.globalpolicy.org/security/membership/mem2.htm> (last visited Mar. 27, 2004).

202. ROBERT M. LEVINE, *SECRET MISSIONS TO CUBA: FIDEL CASTRO, BERNARDO BENES, AND CUBAN MIAMI* 17 (2002)

203. *Id.*

204. *Id.* at 19.

205. *Id.*

206. *Id.*

held a meeting in his office with officials from Immigration and Naturalization, Department of Justice, the Treasury Department, the F.B.I., and the State Department to discuss a letter Brownell had received from Secretary of State, John Foster Dulles, expressing "concern over the activities of ex-President Prío based on reports received from time to time from the Cuban Government as well as from other sources."²⁰⁷ The Attorney General stated at the meeting that "Prío's activities must indeed represent a serious issue between our Government and the Cuban Government for Secretary Dulles to devote his personal attention to it in this manner."²⁰⁸ Brownell further "raised the possibility of a conspiracy charge" against Prío and it was agreed at the meeting that such an investigation should be seriously considered.²⁰⁹ Prío had "financed conspiracies, using Miami Beach's Lucerne Hotel and his own home in South Miami for meetings."²¹⁰ For his trouble in financing the anti-Batista rebels, Prío was indicted by the U.S. Justice Department in 1958.²¹¹ Perhaps in part to atone for earlier sins, Prío became intensely anti-Castro during the 1960s and, in 1968, along with Emilio Núñez Portuondo, a former president of the U.N. Security Council, attended the "'Forum for the Liberation of Cuba'" at the Kings Bay Yacht and Country Club near Coral Gables, Florida.²¹² Prío, thus, entered that murky underworld of anti-Castro paramilitary and intelligence operatives whose existence subsequently assured conspiracy theorists a thriving market for their books and movies. Former BBC journalist, Anthony Summers, claims that Prío was a "friend of top Mafia leaders" and "has been linked in testimony with both Jack Ruby and anti-Castro militant Frank Sturgis."²¹³ The latter, a former CIA-employee living in Miami and veteran of the Bay of Pigs operation, was one of the infamous Watergate burglars. In one of those, "too weird to be true" footnotes, Summers adds that Prío "was found shot dead in 1977 . . . seated in a chair, with a pistol beside him, outside the garage of his Miami home."²¹⁴

207. Memorandum from the Deputy Assistant Secretary of State for Inter-American Affairs (Snow), for the Files (Oct. 22, 1957), <http://www.rose-hulman.edu/~delacova/cable/cable-10-22-57.htm>.

208. *Id.*

209. *Id.*

210. LEVINE, *supra* note 202, at 39.

211. Werner Wiskari, *U.S. Embargo Set on Arms to Cuba*, N.Y. TIMES, Apr. 3, 1958, <http://www.rose-hulman.edu/~delacova/cuban-rebels/4-3-58-embargo.htm>.

212. LEVINE, *supra* note 202, at 178.

213. ANTHONY SUMMERS, CONSPIRACY 500 (1980); *see also*, ANN LOUISE BAVDACH, CUBA CONFIDENTIAL (2002).

214. *Id.*

BRINGING LAW BACK IN

Whatever additional job experience and training might be included in Prío's extraordinary resume, international lawyer and treatise writer are not among them. And even if they were, they would only qualify him to argue before an international tribunal, not sit on one, let alone decide for millions of Koreans and Americans whether, under the terms of international law, the conflict that broke out in northeast Asia, in 1950, along the thirty-eighth parallel was or was not a civil war. The votes of politicians and dictators, their ministers or agents, sitting from time to time on the Security Council of the U.N., have been, and always will be, a poor substitute for legal reasoning based upon the customary rules of law that have evolved over time and the conventional sources of international law indexed in the charter of the World Court. The more the U.S.—or any nation, for that matter—elaborates a “grand strategy” that conforms to the parameters of international law, regardless of the politics and propaganda that invariably hold the U.N. Security Council in a vice-like grip,²¹⁵ the closer they will be to formulating a foreign policy that genuinely promotes both justice (at least that limited form of justice law standing alone can deliver) and the rule of law. The propriety of unilateralism, the legality of unilateral action on the international plane, raises questions of law—questions that cannot be answered in advance by Security Council resolutions. Within the canons of the law of nations, arguments can be identified both for and against the legality of recent American military action in Afghanistan and Iraq. It is time that debate, however, gets beyond the bogus issues of preemptive war and U.N. Security Council decision making. Too much is at stake for the law itself to be indefinitely excluded.

215. See Steven R. Weisman & John H. Cushman, Jr., *U.S. Joins Iraqis to Seek U.N. Role in Interim Rule*, N.Y. TIMES, Jan. 16, 2004, at A1. The U.S. government, having essentially dismissed the U.N. going into the Iraq War, seems to be reconsidering its relationship to the organization:

The Bush administration, trying to rescue its troubled plan to restore sovereignty to Iraq, is joining Iraqi leaders to press the United Nations to play a role in choosing an interim government in Baghdad, administration officials said Thursday The new move involved yet another change in strategy for an administration under pressure from shifting events in Iraq. From the start of planning the war to oust Saddam Hussein, the administration has had an ambivalent attitude toward the United Nations.

Id.

A PUBLIC VIEW OF ATTORNEY DISCIPLINE IN FLORIDA: STATISTICS, COMMENTARY, AND ANALYSIS OF DISCIPLINARY ACTIONS AGAINST LICENSED ATTORNEYS IN THE STATE OF FLORIDA FROM 1988-2002

DEBRA MOSS CURTIS*
BILLIE JO KAUFMAN**

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This article is intended to serve as a commentary and analysis of a public-eye view of disciplinary actions taken against licensed attorneys in the State of Florida during the past fifteen years. The idea for this statistical review arose in 2002, prompted by discussions regarding self-regulation of various professions following the many corporate scandals then playing out in the headlines. Through these discussions, Professors Curtis and Kaufman

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developed the idea of looking at empirical data—from the Florida Bar to determine how the disciplinary system treated Florida lawyers.¹

Each state that licenses attorneys is responsible for both the admittance standards and the discipline system for its licensed lawyers. In some states, the disciplining of lawyers is done behind closed doors, away from a public that cannot be trusted in the same way as they are trusted with judicial matters.² To be sure, much of the public seems to rely on the American Bar Association (“ABA”) as the voice of the legal profession—even though the ABA is a voluntary bar association and is not involved in the licensing of attorneys in any state.³

The number of active attorneys continues to be on the rise. One study has shown that Florida has approximately 3.1 active attorneys for every 1000 persons residing in the state.⁴ This increase in the size of the profession raises questions as to whether the licensing system designed to handle a fewer number of licensees is working. This article will take a look at information regarding the admittance, licensing, and discipline of attorneys from the *public* perspective, not from the *attorneys’* perspective.

The topic of discipline clearly is of interest to lawyers nationwide, particularly to the tens of thousands of solo practitioners and small firm attorneys around the country. The *ABA Journal* has reported a perceived disciplining bias against solo and small firm practitioners.⁵ According to the *ABA*

1. Professor Kaufman was the Director of the Law Library at NSU Law Center until August, 2003.

2. Frank J. Murray, *Practitioners Almost Bulletproof When it Comes to Client Complaints*, INSIGHT ON THE NEWS, Sept. 4, 2000, at http://www.findarticles.com/cf_dls/ml571/33_16/65091764/p1/article.jhtml (last visited Mar. 27, 2004).

3. See *id.* The American Bar Association boasts more than 400,000 members and is “the largest voluntary professional association in the world.” A.B.A., ABOUT THE ABA, at <http://www.abanet.org/about/home.html> (last visited Mar. 27, 2004); see also AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS, at http://www.abanet.org/cpr/discipline/sold/toc_2000.html (last visited Mar. 27, 2004). The American Bar Association Center for Professional Responsibility, Standing Committee on Professional Discipline has published for many years a “Survey on Lawyer Discipline Systems.” See *id.* This survey brings together pure statistics on lawyer discipline from states, but neither has a hand in shaping the disciplines, nor offers commentary on the states’ systems. *Id.*

4. Memorandum from Director of Academic Affairs and Licensing to the ABA Committee on Academic Affairs and Licensing, (September 3, 2003) (on file with author).

5. Mark Hansen, *Picking on the Little Guy*, 89 A.B.A. J. 30, 32 (Mar. 2003). This perception has been discussed at several organized bar meetings in the past year or so. See *id.*;

Journal, small-firm practitioners (the “little guys,” as the *ABA Journal* suggests) are disciplined at a disproportionately higher rate than lawyers in bigger firms, and the number of complaints against small-firm practitioners is higher as well.⁶ However, at the recent 28th National Conference on Professional Responsibility, studies were presented from three state bars, which found no evidence of bias against solo and small firm practitioners in the discipline process.⁷ A study by The State Bar of California concluded that the discipline process indeed had a higher *impact* on small-firm attorneys.⁸ The impact, however, was a result of the factors that place small-firm attorneys at a greater risk for discipline, such as being overworked, and thus missing deadlines—rather than a result of an actual bias against these attorneys.⁹

I. INTRODUCTION, METHODS, AND PURPOSE

For our study, we decided to review the licensing criteria and collected disciplinary reports, for a set number of years, as published by The Florida Bar, the licensing agency for attorneys practicing in Florida.¹⁰ In other words, we placed ourselves in the shoes of a diligent consumer who may be

see also Sharon Lerman, *No Bias Found Against Solos*, CAL. ST. B.J., Aug. 2001, available at <http://www.calbar.ca.gov/calbar/2cbj/01aug/page12-1.htm>. Sharon Lerman opined that the lack of support and managerial skills were more likely to be the root cause of discipline investigations, as well as, clients of small firms were more likely to file a complaint against a solo or small firm. *Id.*; see also STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINT AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW FIRMS AND LARGE SIZE LAW FIRMS 5 (2001), available at http://www.calbar.ca.gov/calbar/pdfs/reports/2001_SB143-Report.pdf (last visited Mar. 27, 2004). The California Bar reported findings of a year-long study by Hilton Farnkopf & Hobson, LLC. *Id.*

6. Hansen, *supra* note 5, at 33.

7. *Id.* “Small firm practitioners” are defined by some states as those working in firms of ten or fewer lawyers.

8. Lerman, *supra* note 5.

9. Hansen, *supra* note 5, at 33. Other such risk factors included experiencing money worries and lacking documentation to defend themselves against complaints. *Id.* One of the difficulties in assessing this type of potential problem was the lack of routinely collected data on those who are disciplined and the specifics of their lawyer life. *Id.*

10. FLA. BAR ONLINE, FREQUENTLY ASKED QUESTIONS, at [http://www.flabar.org/tfb/flabarwe.nsf/f6301f4d554d40a385256a4f006e6566/47fc0a8f415a11d285256b2f006ccb83?](http://www.flabar.org/tfb/flabarwe.nsf/f6301f4d554d40a385256a4f006e6566/47fc0a8f415a11d285256b2f006ccb83?OpenDocument) OpenDocument (last visited Mar. 27, 2004). Any lawyer practicing law in Florida must be a member of the Florida Bar. *Id.*

evaluating a profession, and availed ourselves of information accessible to a *consumer* of legal services.

On The Florida Bar website there is an enormous amount of information geared to consumers of legal services.¹¹ This information includes a searchable database of all lawyers, information on the complaint process, and rules about attorney conduct.¹² But one piece of information it does *not* provide is a full report of all disciplines in a single format available to the public.¹³ We had both seen paragraphs listing the discipline of Florida attorneys published on The Florida Bar website and in *The Florida Bar News*. However, if we wanted a complete overview of the discipline picture, the data collection would be up to us.¹⁴ We developed a plan to collect reports from the Florida Bar website and *The Florida Bar News*, enter the information obtained into a database, analyze the data, and report the findings. We began to compile data, anticipating results in a few months.

More than a year later, after steady work, we finally began our data analysis. We hired some wonderful research assistants to help with our data collection.¹⁵ The research assistants began with The Florida Bar website. After exhausting that resource, they began to collect earlier data published in *The Florida Bar News*, while limiting their research to information accessible to a diligent consumer. The Florida Bar's method of reporting disciplinary actions has evolved through the years, with it recently becoming clearer, more concise, and more thorough. However, that also meant that the older

11. See generally FLA. BAR ONLINE, at <http://www.flabar.org> (last visited Mar. 27, 2004).

12. See *id.*

13. E.g., FLA. BAR ONLINE, THE FLORIDA BAR DISCIPLINARY STATISTICS, at <http://www.flabar.org/tfb/TFBLawReg.nsf/basic+view/F4AB3FF7CB9A5AFA85256B2F006C9F09?OpenDocument> (last visited Mar. 15, 2004) [hereinafter DISCIPLINARY STATISTICS]. The Florida Bar has published an overview of Disciplinary Statistics from 1996 to 2003. *Id.*

14. See, e.g., *Disciplinary Actions*, FLA. B. NEWS, Jan. 1, 2004, available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/Articles?OpenView&Start=6&Count=30&Expand=6#6> (last visited Mar. 27, 2004). *The Florida Bar News* is the industry newspaper of The Florida Bar. It is published twice monthly, on the first and the fifteenth of each month, and a subscription is part of the fee based membership benefits of the Florida Bar. The newspaper is readily available for review by the general public in most law libraries. The Florida Bar publishes paragraphs under the heading *Disciplinary Actions* in this newspaper, detailing actions taken by the Bar against members. See *id.* These paragraphs also appear for a time on the Florida Bar website. *Id.*

15. Our everlasting thanks to Ian Dolan (NSU '04) and Paul Hornick (NSU '04), who completed this phase of the task.

the copy of *The Florida Bar News*, the fewer—and more convoluted—were the reports.

Through diligent research of old issues of the newspapers,¹⁶ and the use of a lot of copy-machine cards, the research assistants gathered page after page of information on disciplinary actions. The research assistants' attempts to obtain data from officials at The Florida Bar proved unfruitful. In fact, The Florida Bar did not release any specific information to us that contributed to our study.¹⁷ We relied solely on what was published by The Florida Bar and what the "public" would be able to obtain. We readily admit that this inconsistency through the years may affect our statistics.¹⁸ However, we felt it imperative to rely only on information available to the public if we were to remain true to the public access component of this project.

We initially set a period of twenty years for our data review. In the end, we decided only to enter data for fifteen years. The main drive behind this decision was the incomplete nature of the older disciplinary reports in *The Florida Bar News*. The further back the issue of the report, the more sporadic the decisions.¹⁹ We decided that including reports compiled from in-

16. The newspapers were obtained through the Nova Southeastern University, Shepard Broad Law Center Library, ("NSU Library") as well as through interlibrary loan from the Broward County Law Library. Both libraries are open to the public.

17. FLA. BAR ONLINE, at <http://www.flabar.org> (last visited Mar. 27, 2004). The Bar Disciplinary Statistics, available at The Florida Bar website, are stated by fiscal year (July 1-June 30), rather than by calendar year. DISCIPLINARY STATISTICS, *supra* note 13. These statistics do not match our finds for two reasons. First, the study is calculated by calendar year rather than bar year, and second, the study calculated only from published paragraphs rather than directly from Bar files. *See id.*

18. *See* Gary Blankenship, *Grievance Group Gears Up for Year-long Examination*, FLA. BAR. NEWS, Oct. 1, 2003 available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/544d81763f45b83385256dac00526f7c?OpenDocument> (last visited Mar. 27, 2004). The authors know for certain that our numbers do not reflect the full number of disciplinary actions occurring in the state. In a recent issue of *The Florida Bar News*, it was reported that in 2002, 414 disciplinary actions were imposed. *Id.* In our look at what was published, only 217 reports of discipline were found.

19. *Disciplinary Actions*, *supra* note 14. The authors considered the fact that there were simply fewer disciplines twenty years ago, giving the appearance of incomplete reporting, but our concern stemmed from the irregular intervals in which the discipline reports appeared. In recent years, discipline reports appeared in every issue of *The Florida Bar News*, although disparate in number. *See id.* In earlier years, we could find no such predictable appearance by the reports. Also, it appeared that discipline categories and their definitions changed a bit in early years. *Id.*

formation two decades old, and probably incomplete, would not give us anywhere near a reliable picture of the disciplinary actions taken by The Florida Bar. We believe that fifteen years worth of data gives a clear, accurate picture of the public's view of attorney discipline.

As we began our data-entry stage (converting printed paragraphs into data in an a spreadsheet program) we thought we were near completion. We were wrong again. The painstaking task of entering the information proved to require a Herculean effort.²⁰ We decided on which categories of information to scrutinize—such as name, year admitted to the bar, and location—and the research assistants began to sort. They took over a room in the library at the NSU Law Center to house the materials and create the database framework. One student became the keeper of each year's files—as well as the precious duplicates, which were guarded for safekeeping—and monitored the comings and goings of the valuable original data. The students divided up the calendar years and began to enter it . . . and enter it . . . and enter it.²¹

We analyzed the data using a combination of tools and methods. The use of Microsoft Excel helped us to sort and count the numbers, percentages, and other hard facts. Ultimately, tallies were done by hand, page by page, counting total numbers by county, discipline, and gender. Comparisons were then made by hand, examining areas such as numbers of men versus women, different counties in which the attorneys practiced, and years of experience. Selected data and its commentary appear in Part III of this article.²²

In doing this article, we do not intend to embarrass any member of The Florida Bar or the institution itself. Rather, in this time of professional crisis, when questions abound as to who oversees professionals and their ethics, we felt that it was important to take this look at a small part of our profession.

20. This monumental task was accomplished thanks to the efforts of Paul Hornick (NSU '04), Marcia Lucas (NSU '04), Scott Havericak (NSU '04), and most particularly Ian Dolan (NSU '04), Katherine Miller (NSU '05), and Jennifer Erdelyi (NSU '05). Extra thanks to Jennifer Erdelyi and Ian Dolan who not only entered data but oversaw its completion and structured its format.

21. While the earlier years of original data generally had few entries, the information given was not as concise and well organized as later years; and thus, it was more difficult to convert into the database format we had developed in Microsoft Excel.

22. Although the students were indispensable with the collection and organization of data, they did not perform any of the analysis or commentary on the data for this article. *See infra* Part III.

Some important disclaimers are necessary. First, we have not seen the original documents associated with these attorney complaints, nor have we been involved with any of these cases. Second, to repeat, we did not obtain our data directly from The Florida Bar. As stated, we collected what was readily available to the public, through common methods—what was published by The Florida Bar. We know there were many disciplines, which for undeterminable reasons, did not appear on The Florida Bar website or in *The Florida Bar News*. Therefore, the study's numbers most likely do not match official Florida Bar information. Third, the authors are not trained statisticians. The authors are legal scholars, who have collected research and used it to evaluate the profession. Fourth, we are human. We recognize that, unfortunately, a portion of the public does not associate this trait with attorneys; nevertheless, the authors are subject to error. Although we have used computer programs and undertaken multiple reviews of our information, it is possible that a portion of otherwise available data was missed or even miscalculated in our current data. Nevertheless, all of these issues notwithstanding, we believe that the overreaching message that we present is on target.

Part II of this article provides an overview of the admittance system and the discipline system for attorneys who are members of The Florida Bar. Part III offers some of our data as well as our analysis of our findings. Part IV outlines some of our conclusory thoughts and plans for the discipline of attorneys.

II. THE FLORIDA SYSTEM

A. *Admittance to the Florida Bar*

The admission of attorneys to the practice of law in the State of Florida is accomplished through the judicial system of the state.²³ The Supreme Court of Florida, the highest court in the state, has an administrative arm, called The Florida Board of Bar Examiners, which handles bar admissions.²⁴

23. FLA. BAR ADMISS. R. 1-11.

24. FLA. BAR ADMISS. R. 1-12. The Florida Board of Bar Examiners consists of twelve members of The Florida Bar and three members of the general public who are not attorneys. FLA. BAR ADMISS. R. 1-21.

The Florida Bar is often considered to be an exclusive organization, which is difficult to join.²⁵ Admission is divided into two general categories.²⁶ One is the taking, and passing, of the Florida Bar Exam and a Multi-state Professional Responsibility Exam.²⁷ The second requirement, which is often improperly given less emphasis by potential applicants, requires applicants to pass a character and fitness screening before admission.²⁸

The Supreme Court of Florida has held that the “good moral character” requirement emphasizes “honesty, fairness, and respect for the rights of others”²⁹ An applicant’s standard of conduct also “must have a rational connection to the applicant’s fitness to practice law.”³⁰

Rule 3 of the *Rules of the Supreme Court Relating to Admission to the Bar*, focuses on the “background investigation” of applicants.³¹ Rule 3-10 sets the standards of attorneys admitted to the Bar.³² Some are academic, grasping fundamental principles and reasoning, while others focus on the practice of law.³³ More specifically, a potential Bar member should have both the ability to, and in likelihood will:

- (1) Comply with deadlines.
- (2) Communicate candidly and civilly with clients, attorneys, courts and others.

25. See FLA. BAR ADMISS. R. 1-16. The fee for filing an application to The Florida Bar and sitting for the exam can be as high as \$2500. FLA. BD. OF BAR EXAM’RS, FREQUENTLY ASKED QUESTIONS, at [http://www.floridabarexam.org/public/main.nsf/faq.html?](http://www.floridabarexam.org/public/main.nsf/faq.html?OpenPage) OpenPage (last visited Mar. 27, 2004). All applicants to the Bar must sit for the actual Florida Bar examination. *Id.* No one may gain “reciprocity” through admittance from another state. *Id.* Florida does not accept partial exam scores from other states. *Id.*

26. *Id.*

27. FLA. BAR ADMISS. R. 4-20. Rule 4 sets forth the requirements of the examinations and standards for passing. *Id.*

28. FLA. BAR ADMISS. R. 1-14.2. The Bar requires applicants to possess “good moral character.” FLA. BAR ADMISS. R. 2-14.1. The purpose of the character and fitness screening is “to protect the public and safeguard the judicial system.” FLA. BAR ADMISS. R. 1-14. Rule 2-12 specifically states that all applicants seeking admission “shall produce satisfactory evidence of good moral character.” FLA. BAR ADMISS. R. 2-12.

29. Fla. Bd. of Bar Exam’rs re G.W.L., 364 So. 2d 454, 458 (Fla. 1978).

30. *Id.*

31. FLA. BAR ADMISS. R. 3.

32. FLA. BAR ADMISS. R. 3-10.

33. FLA. BAR ADMISS. R. 3-10.1.

- (3) Conduct financial dealings in a responsible, honest, and trustworthy manner.
- (4) Avoid acts that are illegal, dishonest, fraudulent, or deceitful.
- (5) Conduct oneself in accordance with the requirements . . . and the Rules of Professional Conduct.³⁴

Ultimately, an applicant who has complied with the rules for admission, passed the requisite examinations, and met character and fitness standards will be recommended to The Florida Bar by the Board of Bar Examiners for admission.³⁵ The Supreme Court of Florida will enter an order of admission upon its satisfaction of this recommendation.³⁶ Once an attorney either participates in an induction ceremony³⁷ or is otherwise sworn in,³⁸ the applicant then becomes subject to the administration of The Florida Bar and the *Rules Regulating the Florida Bar*.³⁹

B. The Disciplinary System

Chapter three of the *Rules Regulating the Florida Bar* govern the disciplinary system of the Florida Bar.⁴⁰ Through these rules, “[t]he Supreme Court of Florida establishes the authority and responsibilities of The Florida Bar . . .” as well as the responsibilities of its member attorneys.⁴¹ In Florida,

34. FLA. BAR ADMISS. R. 3-10.1(c)(1)-(5).

35. FLA. BAR ADMISS. R. 5-10.

36. FLA. BAR ADMISS. R. 5-11.

37. FLA. BAR ADMISS. R. 5-12.

38. FLA. BAR ADMISS. R. 5-13.

39. FLA. BAR ADMISS. R. 5-15.

40. R. REGULATING FLA. BAR 3. The Florida Bar is both a licensing organization as well as a professional membership organization. This duality of function is called an “integrated” bar. FLA. BAR ONLINE, HISTORY OF THE FLORIDA BAR, at <http://www.flabar.org/tfb/TFBOrgan.nsf/basic+view/9C81AD9FC9FC8A5852566B2F006CD27B?OpenDocument> (last visited Mar. 27, 2004). In other states, the licensing and professional membership functions for attorneys are held by separate organizations.

41. FLA. STDS. IMPOSING LAW SANCS. 1.1, at <http://www.flabar.org/TFB/TFBLawReg.nsf/0/691CC41E2886B8E7852566B2F006CD7AD?OpenDocument> (last visited Mar. 27, 2004). The Supreme Court of Florida has the power under the Florida Constitution to regulate the admission of members of the Bar with the right to practice law, and thus set the ethical standards for those members. FLA. CONST. art. V, § 15. The current *Rules of Professional Conduct* were adopted in the late 1980’s and are based on the *ABA Model Rules of Profes-*

the Supreme Court of Florida has the power to set the “standards of conduct for lawyers, [as well as] to determine what constitutes grounds for discipline” for attorneys practicing in Florida.⁴² The Supreme Court of Florida is also ultimately responsible for disciplining Florida attorneys, including revoking licenses to practice law.⁴³ This system is not without critics. The executive director of the legal reform group HALT has been quoted as stating that non-lawyers are capable of having, and should have a role in the discipline process.⁴⁴

According to The Florida Bar website, the purpose of holding bar proceedings to discipline attorneys “is to protect the public and the administration of justice . . .” from attorneys who do not (or may not) correctly perform their professional duties either to clients, or the entire legal system.⁴⁵

It is important to note that the disciplining of lawyers in Florida, which creates a public record, is different from the concept of the civil wrong of malpractice in Florida.⁴⁶ When attorneys are sued in a civil lawsuit for malpractice, the litigation is filed in the civil court system of the judicial circuit having jurisdiction over the attorney’s actions.⁴⁷ A case proceeds according to the court and substantive rules and laws governing that cause of action. However, the case must be initiated within the statute of limitations as set forth by section 95.11 of the *Florida Statutes*.⁴⁸ The goal in a malpractice lawsuit is usually monetary compensation for the client.⁴⁹

sional Conduct. See Timothy P. Chinaris, *A Brief Overview of Lawyer Regulation in Florida*, at <http://www.flabar.org/tfb/TFBConsum.nsf/basic+view/90DAD2CF7A8F877B85256B2F006C61BD?> (last visited F Mar. 27, 2004).

42. R. REGULATING FLA. BAR 3-1.2.

43. *Id.*

44. Murray, *supra* note 2. As quoted, “[i]f a jury made up of nonlawyers is good enough to decide a murder case or a million-dollar lawsuit, it’s certainly capable of determining whether a lawyer has cheated a client.” *Id.* As will be discussed, non-lawyers do have some input into the discipline system in the State of Florida.

45. FLA. STANDARDS IMPOSING LAW SANCS. 1.1.

46. R. REGULATING FLA. BAR 3-7.1(b).

47. See FLA. BAR. ONLINE, CONSUMER PAMPHLET: COMPLAINT AGAINST A FLORIDA LAWYER, at <http://www.flabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/c5b7d247a0c9c45a85256b2f006c6186?OpenDocument> (last visited Mar. 27, 2004) [hereinafter COMPLAINT AGAINST A FLORIDA LAWYER].

48. FLA. STAT. § 95.11 (2002).

49. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

A bar disciplinary proceeding is different. As in other professions, such as the medical practice, attorneys are self-regulated, meaning that they have power to discipline their own members.⁵⁰ In contrast with other professions in Florida, attorneys are disciplined at a high rate. In the 1999-2000 fiscal year, the Bar disciplined the second highest percentage of its members among all Florida self-regulated professions.⁵¹

In Florida, the grievance process against an attorney begins with a complaint.⁵² According to a public-access consumer pamphlet, *Complaint Against a Florida Lawyer*, a client who has a dispute with a lawyer should always write a non-threatening letter to the lawyer first.⁵³ That letter should thoroughly explain the problem and attempt to resolve it.⁵⁴ If the resulting action is unsatisfactory, the client should then contact the Attorney and Consumer Assistance Program ("ACAP"), which was launched by The Florida Bar in March 2001.⁵⁵ This program is designed to assist a client in resolving problems prior to a complaint being filed.⁵⁶ The following is a list of disputes that The Florida Bar has the authority to investigate:

A lawyer will not give you money he or she is holding on your behalf or will not give you a full written accounting; A lawyer continually fails to respond to inquiries about the case, to tell you about the court dates, or to appear in court; A lawyer lies or advises you or someone else to lie in the course of a case; A lawyer represents you as well as another person whose interests conflict with yours. A lawyer does not do what he or she has promised or does not do it in a timely way.⁵⁷

50. Jan Pudlow, *Disciplinary Details*, FLA. B. NEWS, Mar. 15, 2001, available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/5cb1a95d473c0a5585256b0a007269c0?OpenDocument> (last visited Mar. 27, 2004).

51. *Id.* Only the Board of Dentistry disciplined a higher percentage of its licensees. *Id.*

52. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

53. *Id.*

54. *Id.*

55. Pudlow, *supra* note 50. The Attorney and Consumer Assistance Program ("ACAP") was created by the Florida Bar to investigate charges of unethical conduct against lawyers practicing in Florida. *Id.* ACAP does not handle fee disputes between clients and attorneys. *Id.*

56. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

57. FLA. BAR ONLINE, CONSUMER PAMPHLET: ATTORNEY CONSUMER ASSISTANCE PROGRAM, at <http://www.flabar.org/tfb/TFBConsum.nsf/basic+view/90DAD2CF7A8F877B8>

When a client contacts ACAP, the client first discusses the problem with ACAP's non-lawyer personnel, in order to explore the behavior of the subject attorney.⁵⁸ The information then is forwarded to ACAP attorneys, employed by The Florida Bar, who contacts the client for further discussion.⁵⁹ The role of the ACAP attorney is to help the client determine whether a complaint should be filed.⁶⁰ If the ACAP attorney determines that it is appropriate to do so, the ACAP attorney will assist the client in beginning the process of filing the complaint.⁶¹

A complaint filed against an attorney must always be in writing and signed under oath.⁶² The proper complaint is a simple one-page document, although it allows the complainant to attach detailed information in order to properly document the nature of the problem at issue.⁶³ Complainants must be aware that the name, address, and telephone number of the person making the complaint, technically called an "inquiry" at this stage, not only becomes public record, but also is affirmatively disclosed to the attorney who is the subject of the complaint.⁶⁴

Once a complaint is received by The Florida Bar, a file is created.⁶⁵ The case is assigned to a Florida Bar disciplinary staff attorney, in order to determine whether The Florida Bar has jurisdiction to investigate the inquiry.⁶⁶

5256B2F006C61BD? (last visited Mar. 27, 2004). [hereinafter ATTORNEY CONSUMER ASSISTANCE PROGRAM]. ACAP, The Florida Bar website, has extensive Consumer Services information. *Id.* Detailed guidance is available in print or the consumer can print it off the web site in PDF form. *Id.* Information is available in both English and Spanish. *Id.* A consumer of legal services merely has to go to The Florida Bar website, click on Consumer Services and the information and forms necessary to institute a complaint are highly accessible and available. *Id.*

58. ATTORNEY CONSUMER ASSISTANCE PROGRAM, *supra* note 57.

59. *Id.*

60. *Id.*

61. *Id.*

62. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

63. FLA. BAR ONLINE, CONSUMER PAMPHLETS: INQUIRY/COMPLAINT FORM, at [http://www.flabar.org/TFB/TFBResources.nsf/Attachments/AB230E7DCCC3B75385256B29004BD6DC/\\$FILE/acap-form-web04.pdf?OpenElement](http://www.flabar.org/TFB/TFBResources.nsf/Attachments/AB230E7DCCC3B75385256B29004BD6DC/$FILE/acap-form-web04.pdf?OpenElement) (last visited Mar. 27, 2004).

The Florida Bar website has a form which may be downloaded, or it may be sent from ACAP to a client. *Id.*

64. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

65. *Id.* This file is retained "in The Florida Bar's records for twelve months after the case is closed," even if the complaint is dismissed. *Id.*

66. *Id.*

Where The Florida Bar finds it does not have jurisdiction, no further action is taken by the Bar, and the file is closed.⁶⁷ If Bar counsel determines that the Bar does have jurisdiction, then the matter becomes technically known as a "complaint."⁶⁸ In this case, the file is converted to a formal disciplinary file, and the Bar attorney begins the investigative process.⁶⁹

Next, counsel for The Florida Bar writes to the lawyer, who is the subject of the complaint, and requests a response regarding the matter, which the accused lawyer is required to provide.⁷⁰ Generally, the accused attorney must respond within fifteen days, although extensions are granted liberally.⁷¹ Subsequently, the complainants are allowed to respond and rebut the information contained in the lawyer's response.⁷²

Depending on the nature of the allegations, counsel for The Florida Bar may take other factual investigative steps before conducting a review to determine whether the case should be moved to the next stage of the proceeding—the grievance committee.⁷³ A grievance committee is comprised of volunteers.⁷⁴ The committee's composition requires that at least one-third are not lawyers.⁷⁵ The committee serves within its judicial circuit to review "complaints with much the same purpose as a grand jury."⁷⁶ Grievance committees may be informal, and are not bound by the rules of evidence or similar restrictions in its decision-making.⁷⁷ However, the committee only may hear complaints if a quorum, consisting of a minimum of three members

67. *Id.* The complaint is forever labeled "inquiries" at that point. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

68. *Id.*

69. *Id.* A matter regarding discipline which is not at any point conducted in the courts is confidential and may only be disclosed in accordance with rule 3-7.1 of the *Rules Regulating the Florida Bar*. R. REGULATING FLA. BAR 3-7.1. These rules ensure the confidentiality of information about cases that is provided the Bar in connection with disciplinary actions filed. *Id.*

70. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

76. *Id.* Florida's Courts are divided into twenty numbered Judicial Circuits, divided by geography. *Id.* Some counties comprise an entire judicial circuit, while other small counties may combine to be one judicial circuit. *Id.*

77. *Id.*

"2 of whom must be lawyers" exists.⁷⁸ A finding of probable cause must be made by majority vote of the group present.⁷⁹

Upon a finding of probable cause by the grievance committee, counsel for The Florida Bar proceeds to file a formal complaint against the accused attorney with the Supreme Court of Florida.⁸⁰ If that complaint is contested by that attorney, the matter is sent to a circuit or county court judge for a trial on the complaint.⁸¹ The judge in this matter is referred to as a "referee," and hears evidence prior to making a finding of fact.⁸² This finding serves as a recommendation to the Supreme Court of Florida, which has the final authority to decide on the discipline of any Florida attorney.⁸³ Alternatively, cases may be settled without such a trial.⁸⁴

The types of discipline which may be imposed upon a lawyer are enumerated in rule 3-5 of the *Rules Regulating the Florida Bar*.⁸⁵ When the Supreme Court of Florida finds a member of The Florida Bar guilty of misconduct, the court may impose one of many levels of discipline.⁸⁶ First, the rules clearly distinguish situations which constitute "minor misconduct."⁸⁷ Minor misconduct is defined by the rules as a function of what is *not* minor misconduct rather than an affirmative statement of what *is* minor misconduct.⁸⁸ Rule 3-5.1(b)(1) enumerates six conditions in which misconduct will not be regarded as minor: 1) "misappropriation of a client's funds or property;" 2) behavior "likely to result in actual prejudice . . . to a client;" 3) improper behavior by an attorney who "has been publicly disciplined in the past 3 years;" 4) "misconduct . . . of the same nature [for which the subject attorney] has been disciplined in the past 5 years;" 5) "misconduct [which] in-

78. R. REGULATING FLA. BAR 3-7.4(g)(1).

79. R. REGULATING FLA. BAR 3-7.4(g)(3).

80. COMPLAINT AGAINST A FLORIDA LAWYER, *supra* note 47.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*; see also Fla. Bar v. Barley, 777 So. 2d 941 (Fla. 2000).

85. R. REGULATING FLA. BAR 3-5.1. In addition, Part B of the *Standard for Imposing Lawyer Sanctions*, describes the levels of discipline and reasons why each may be assessed. FLA. STDS. IMPOSING LAW. SANCS. 2.1-2.10.

86. R. REGULATING FLA. BAR 3-5.1(a). The Referee usually recommends a specific sanction according to discipline, but the Supreme Court of Florida ultimately decides this issue. R. REGULATING FLA. BAR 3-5.1.

87. R. REGULATING FLA. BAR 3-5.1(b).

88. *Id.*

cludes dishonesty, misrepresentation, deceit, or fraud” by the subject attorney; and 6) behavior constituting a felony.⁸⁹ Attorneys who are accused of minor misconduct may either admit to the behavior, or may have the Board of Governance reject a grievance committee report recommending minor misconduct.⁹⁰ In either event, appropriate steps to either conclude the matter or to take it to the next stage of the proceeding will take place.

If minor misconduct is found, the appropriate discipline is an “admonishment,” which declares that the conduct of the attorney was not proper, but does not limit that attorney’s right to practice law within the state.⁹¹ A grievance committee can recommend admonishment for behavior that is other than minor if “unusual circumstances” are present in a case; otherwise, admonishments only are administered for minor misconduct.⁹² An admonishment consists of a memorandum administering the admonishment, which is placed as part of the record of the proceeding, and a requirement that the offending attorney must appear before either the Board of Governors or a grievance committee to be verbally reprimanded about the misbehavior.⁹³

Another option for disciplining an attorney is the issuance of a public reprimand, which also declares the conduct in question to be improper.⁹⁴ Like an admonishment, it does not put any limit on the attorney’s right to practice law in the state.⁹⁵ Public reprimands may be appropriate where injury or potential injury is caused, where the attorney’s behavior was negli-

89. *Id.*

90. R. REGULATING FLA. BAR 3-5.1(b)(4)-(5).

91. R. REGULATING FLA. BAR 3-5.1(a). In our reading of published disciplines, the word admonishment was not used. However, we occasionally (as reflected by data in Part III) saw a description of a “private reprimand” given to an attorney. As there is no such discipline described in the rules, matching the concepts of the rules to the published discipline, we determined that these were equal.

92. R. REGULATING FLA. BAR 3-5.1(b)(2). Admonishments are generally given when there is little or no injury, or where there is a technical violation of the rules. FLA. STDS. IMPOSING LAW. SANCS. 4.14, 4.24, 4.34, 4.44, 4.54, 5.14, 5.24, 6.14, 6.24, 6.34, 7.4.

93. R. REGULATING FLA. BAR 3-5.1(a).

94. *Id.* at 3-5.1(d).

95. *Id.*

gent and not knowing or intentional.⁹⁶ The judgment of a public reprimand is published in the Southern Reporter.⁹⁷

For misconduct by attorneys considered more than merely “minor,” a host of more severe disciplines are available to the court. The most severe of these is disbarment which is authorized by Rule 3-5.1(f).⁹⁸ Attorneys who are disbarred lose their status as members of The Florida Bar and have their privilege to practice law in the state terminated for a period of time.⁹⁹ Attorneys who are permanently disbarred, or disbarred with leave, may apply for readmission.¹⁰⁰ An attorney who has been disbarred may reapply for admission to The Florida Bar only after a period of five years from the date of disbarment, or longer if so ordered.¹⁰¹ The disbarred attorney must demonstrate total compliance with the rules required for bar admission, and have competent and substantial evidence of rehabilitation to again practice law.¹⁰²

Florida Bar rules provide for a rebuttable presumption of disbarment when an attorney is found guilty of theft from trust accounts or from other funds received by a lawyer in a fiduciary relationship.¹⁰³ In addition, disbarment generally is recognized as an appropriate punishment when an attorney intentionally reveals information regarding a client’s matter, with the intent to benefit a third person; and the disclosure, which would not otherwise be permitted, causes potential or real injury to the client.¹⁰⁴ Disbarment also is appropriate when an attorney engages in actions that present a knowing conflict of interest with clients, such as representing clients with adverse interests, causing injury, or using information from a conflict, which causes injury.¹⁰⁵ In fact, if an attorney knowingly or intentionally deceives a client,

96. See FLA. STDS. IMPOSING LAW. SANCS. 4.13, 4.23, 4.43, 4.63, 5.13, 6.13, 6.23, 6.33, 7.3, 8.3; Fla. Bar v. Kelner, 670 So. 2d 62 (Fla. 1996); Fla. Bar v. Lumley, 517 So. 2d 13 (Fla. 1987).

97. R. REGULATING FLA. BAR 3-5.1(d).

98. R. REGULATING FLA. BAR 3-5.1(f).

99. *Id.*

100. *Id.*; see Fla. Bar *re* Hipsh, 586 So. 2d 311 (Fla. 1991); Fla. Bar v. Ryder, 540 So. 2d 121 (Fla. 1989).

101. R. REGULATING FLA. BAR 3-5.1(f)

102. *Id.* According to a recent article in the ABA Journal, it is common for jurisdictions to emphasize rehabilitation rather than simply punishment. Terry Carter, *Bounced from the Bar*, 89 A.B.A. J. 56, 59 (Oct. 2003).

103. R. REGULATING FLA. BAR 3-5.1(f).

104. FLA. STDS. IMPOSING LAW. SANCS. 4.21.

105. FLA. STDS. IMPOSING LAW. SANCS. 4.31.

disbarment may be appropriate, regardless of injury.¹⁰⁶ Failure to diligently practice law may present disbarment problems when a lawyer abandons his or her practice, “knowingly fails to perform services,” or has repeating periods of neglect with client matters; any of which can cause potential or actual serious injury to the client.¹⁰⁷ Furthermore, disbarment may even be appropriate when a lawyer’s lack of understanding of fundamental legal doctrines or procedures causes potential or real injury to a client.¹⁰⁸

Other violations may be cause for disbarment. Standard 5.1 outlines specific “failure[s] to maintain personal integrity,” which include being convicted of a felony, engaging in a drug sale, fraud, or deceitful behavior.¹⁰⁹ Failure to maintain “public trust,” intentionally deceiving the court, abusing the legal process, improperly communicating with persons involved in the legal system, or intentionally violating the terms of a prior disciplinary order—all of which injure the client and potentially the public, the legal system, or the legal profession—are all appropriate reasons to consider disbarment.¹¹⁰

There are additional sanctions that temporarily may remove an attorney from the practice of law. The Florida Bar refers to these sanctions as “suspension” and “emergency suspension.”¹¹¹ Authorized in Rules 3-5.1(e) and 3-5.2, suspension forbids a lawyer from practicing law for a specified period of time.¹¹² Suspensions generally are divided into two categories—those of ninety days or less, which do not require proof of rehabilitation or passage of the bar examination); and suspensions of more than ninety days, which do require rehabilitation and may also require passage of all or part of the bar

106. FLA. STDS. IMPOSING LAW. SANCS. 4.61.

107. FLA. STDS. IMPOSING LAW. SANCS. 4.41.

108. FLA. STDS. IMPOSING LAW. SANCS. 4.51.

109. FLA. STDS. IMPOSING LAW. SANCS. 5.11(a)-(f); *see also* Fla. Bar v. Mart, 550 So. 2d 464 (Fla. 1989).

110. FLA. STDS. IMPOSING LAW. SANCS. 6.21, 6.31, 7.1, 8.1.

111. FLA. STDS. IMPOSING LAW. SANCS. 2.3, 2.4.

112. R. REGULATING FLA. BAR 3-5.1(e), 3-5.2; *see* Fla. Comm. on Prof'l Ethics and Grievances, Formal Op. 90-3 (1990), *available at* <http://www.flabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+90-3?opendocument> (last visited Mar. 27, 2004); Fla. Comm. on Prof'l Ethics and Grievances, Formal Op. 62-26 (Reconsideration) (1986) (regarding treatment of attorneys who have been suspended), *available at* [http://www.flabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+6226+\(Reconsideration\)?opendocument](http://www.flabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+6226+(Reconsideration)?opendocument) (last visited Mar. 27, 2004).

exam.¹¹³ Suspensions may not be ordered in excess of three years.¹¹⁴ Suspensions are appropriate for the same reasons as disbarment, albeit, with a reduced penalty for less severe misconduct. The reasons for suspension may include: violations regarding improper dealing with client property that causes injury, revealing confidential information of a client, knowing of conflicts of interest without disclosing them to clients, knowingly fail to perform services for a client, knowingly lack the necessary competence causing injury, or knowingly deceive a client causing injury, or causing potential injury.¹¹⁵

In addition, suspension may be the appropriate sanction for an attorney who engages in criminal conduct that “seriously adversely reflects” on that attorney’s fitness as an attorney, but does not reach the level as delineated in Standard 5.11 regarding disbarment.¹¹⁶ Failure to maintain public trust, making false statements, violating court orders or rules, or interfering or potentially interfering with a legal proceeding may be situations for suspension.¹¹⁷ Violations of other duties, such as improper communication or other behavior, causing intentional injury or potential injury to the client, the public, or the legal system, are also appropriate scenarios under which suspension may be imposed.¹¹⁸ Finally, if an attorney already has been publicly reprimanded for the same or similar conduct, and subsequently has another violation of a similar type, a suspension may be the appropriate order.¹¹⁹

An “emergency suspension” is the temporary suspension of an attorney from the practice of law pending the final outcome of a disciplinary action.¹²⁰ This disciplinary action may occur in circumstances when an attorney has been convicted of a “serious crime” or when an attorney’s conduct will cause, “or is likely to cause immediate and serious injury to a client or the public.”¹²¹ The Florida Bar is required to file a formal complaint of disci-

113. FLA. STDS. IMPOSING LAW. SANCS. 2.3.

114. *Id.*

115. FLA. STDS. IMPOSING LAW. SANCS. 4.12, 4.22, 4.32, 4.42, 4.62.

116. FLA. STDS. IMPOSING LAW. SANCS. 5.12; *see* Fla. Bar v. Finkelstein, 522 So. 2d 372 (Fla. 1988).

117. FLA. STDS. IMPOSING LAW. SANCS. 6.12, 6.22.

118. FLA. STDS. IMPOSING LAW. SANCS. 6.32, 7.2.

119. FLA. STDS. IMPOSING LAW. SANCS. 8.2; *see* Fla. Bar v. Shinnick, 731 So. 2d 1265 (Fla. 1999).

120. FLA. STDS. IMPOSING LAW. SANCS. 2.4.

121. *Id.*

pline within sixty days of an order of emergency suspension.¹²² Such a case then proceeds directly to trial, skipping the need for a probable cause hearing before a grievance committee.¹²³ Attorneys may move to have the emergency order dissolved.¹²⁴

The rules address in detail another form of discipline, probation, which limits the right of an attorney to practice.¹²⁵ Attorneys may be placed on probation between six months and three years, or for an indefinite period of time according to a specific order.¹²⁶ The order declaring the discipline must state the conditions of that attorney's probation.¹²⁷ According to rule 3-5.1, these conditions "may include but are not limited to:" completing continuing education programs, being supervised by licensed attorneys on substance or finances, reporting to agencies, and being restricted on certain types of activities.¹²⁸

In considering which of these sanctions should be applied to a lawyer who has been subjected to the disciplinary system, the *Florida Standards for Imposing Lawyer Sanctions* states that a court should consider the following factors: 1) the duty violated by the attorney; 2) the mental state of the attorney; 3) "the potential or actual injury caused by the lawyer's misconduct"; and 4) whether any mitigating or aggravating factors existed in the matter.¹²⁹ Aggravating factors may justify an increase in the discipline level imposed on an attorney.¹³⁰ Facts which may be considered aggravating include: prior disciplinary offenses, experience level, patterns of misconduct, or vulnerability of the victim of the offense.¹³¹

By contrast, mitigating factors may justify a reduction in the discipline imposed.¹³² Such mitigating factors may include: absence of prior records or dishonest motive, personal problems or situations, good faith efforts to rec-

122. R. REGULATING FLA. BAR 3-5.2(d).

123. *Id.*

124. R. REGULATING FLA. BAR 3-5.2(e)(1).

125. R. REGULATING FLA. BAR 3-5.1(c).

126. *Id.*

127. *Id.*

128. *Id.*

129. FLA. STDS. IMPOSING LAW. SANCS. 3.0.

130. FLA. STDS. IMPOSING LAW. SANCS. 9.21.

131. FLA. STDS. IMPOSING LAW. SANCS. 9.22(a), (c), (h), (i).

132. FLA. STDS. IMPOSING LAW. SANCS. 9.31.

tify consequences, impairments, and overall character.¹³³ Also, it is interesting to note that several factors, such as resigning prior to discipline being imposed, the complainant's recommendation as to sanction, or withdrawal of a complaint, will not be considered either aggravating or mitigating.¹³⁴ Additionally, a specific set of standards regarding sanctions in drug-related matters has been set out by The Florida Bar.¹³⁵

III. OUR FINDINGS

“What is abundantly clear is that The Florida Bar and the Florida Supreme Court take regulatory responsibility very seriously. . . . The Florida Bar's regulatory system is highly rated among other states, and we have again confirmed that it is highly effective in Florida.”—*Herman Russo-manno, Florida Bar President 2000-2001*.¹³⁶

A. General Findings

Our findings lead us to a cross roads of expectations and results. Ultimately, the numbers of disciplinary actions that we collected were a lower number than we expected to find.¹³⁷ A relatively low number of disciplinary actions issued by The Florida Bar could ultimately be interpreted by a consumer in two ways. First, the Bar is doing a fabulous job of admitting attorneys with high character, and continually educating them because the numbers within the profession requiring discipline appear to be low. On the other hand, a consumer could conclude that there is something wrong with the discipline system itself, either the cases of misconduct are not being reported or they are not being processed through the system all the way to sanction.

133. FLA. STDS. IMPOSING LAW. SANCS. 9.32(a)-(d), (g)-(h).

134. FLA. STDS. IMPOSING LAW. SANCS. 9.4(c)-(e).

135. FLA. STDS. IMPOSING LAW. SANCS. 10.0.

136. Pudlow, *supra* note 50.

137. A reminder that the number we collected through public access sources is lower than the actual number of disciplines rendered. Despite that, we still expected much higher numbers, particularly in light of scattered pieces of Bar information that indicated that “[i]n a typical year . . . the Bar receives between 8,000 and 9,000 complaints.” Blankenship, *supra* note 18.

Table 1: Florida Disciplines

| Year | '88 | '89 | '90 | '91 | '92 | '93 | '94 | '95 | '96 | '97 | '98 | '99 | '00 | '01 | '02 |
|-------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Total | 149 | 136 | 151 | 147 | 196 | 188 | 187 | 177 | 202 | 202 | 273 | 217 | 250 | 281 | 217 |

For example, a consumer of legal services making a rough estimate could conclude that according to The Florida Bar website, Bar membership in August 2003, was 72,728 attorneys, including inactive, good standing, and retired members. Since only 217 disciplines were reported, only about .30% of all attorneys are being disciplined. Therefore, attorneys in Florida are, in whole, an honest and respectable group.

However, given the scandals emerging from corporate America, and given the publicity in the past year for a “Dignity in Law” public campaign by The Florida Bar President,¹³⁸ this low percentage could also indicate, to a skeptical consumer, that the attorney self-regulation process is not working. Unlike other professionals in Florida who fall under the auspices of the Department of Business and Professional Regulation, the Supreme Court of Florida is the ultimate finder of discipline for attorneys.¹³⁹ As much as the public may see the court system and attorneys as one entity, although they

138. *Bar to Launch 'Dignity in Law' Campaign*, FLA. B. NEWS, Apr. 15, 2002, available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b9673698525699900624829> (last visited Mar. 27, 2004). This campaign, created by then President-elect of The Florida Bar, Todd Aronovitz, was approved by the Board of Governors in April 2002 for the purpose of communicating the positive work of attorneys throughout Florida. *Id.* It was the first program of its kind in the nation. *Id.*

139. R. REGULATING FLA. BAR 3-3.1. On the other hand, the DBPR of Florida licenses more than 359,000 professionals, including “architecture and interior design; asbestos consultants; athlete agents; auctioneers; barbers; building code administrators and inspectors; community association managers; the construction industry; cosmetology; electrical contractors; employee leasing; farm and child labor; funeral directors and embalmers; geologists; landscape architecture; pilot commissioners; pilots rate review; surveyors and mappers and veterinary medicine.” FLA. DEPT OF BUS. & PROF'L REGULATION, ANNUAL REPORT 2002–2003, available at http://www.myflorida.com/dbpr/os/ospubs/ar_0203.pdf (last visited Mar. 27, 2004).

are clearly not, the concept of “inside regulation” may seem abhorrent to many consumers.¹⁴⁰

B. *Growth in Discipline Numbers Generally*

While we clearly witnessed an increase in disciplines over our time period, this growth can be attributed to various possible reasons. First, the number of attorneys committing breaches of the rules of professional conduct could be growing. This is a simple, plausible explanation. As Bar Membership increases, the members in practice undertake more cases, which in turn, results in more ethical problems, rendering rule violations almost inevitable. However, the rate is clearly growing slower than the Bar membership rate, which is a good sign for the Bar itself and for consumers of legal services.¹⁴¹

Second, consumers of legal services could be getting more aggressive in pursuing remedies to unethical conduct. As we as a society become more selective in our consumer choices in general, we may also be more likely to report perceived unethical conduct by otherwise trusted professionals.¹⁴² In the wake of corporate, church, and medical scandals, society has become less trusting of professionals, who in the past we otherwise put our complete faith, and more likely to bring a grievance.

Third, information is more readily available to the public about the grievance process. With the inception of the ACAP program to assist the public, and with widespread use of the Internet to gather information, par-

140. The system is not as cohesive as many in the public may believe. Not only are judges and attorneys held to different standards of conduct, but it is important to remember that public members also sit on the committees that hear probable cause in complaints. R. REGULATING FLA. BAR 3-3.4(c). The *Code of Judicial Conduct* operates independently from the *Rules Regulating the Florida Bar*. JUDICIAL QUALIFICATIONS COMM’N, SUP. CT. OF FLA., FILINGS, at <http://www.flcourts.org/pubinfo/jqc/index.html> (last visited Mar. 27, 2004).

141. See Table 1. The year 2002 appears to be an exception to the growing trend in disciplines, with the 2002 total reverting back to the 1999 figure according to our numbers. *Id.* One possible explanation for this is the September 11, 2001 tragedy, which may have changed the focus of both attorneys and consumers lives. Attorneys may have taken stock of their behavior and acted more ethically; while the attention of consumers may have been on other matters than lawyer discipline.

142. See Don Klausmeyer, *Web Sites that Work: Build Customer Loyalty and Satisfaction Online*, SMART PROS, Mar. 27, 2000, at <http://finance.pro2net.com/x24208.xml> (last visited Mar. 27, 2004).

ticularly from the Florida Bar website about grievances, the public,¹⁴³ although perhaps not more inclined to file grievances against attorneys, is more educated and has the accessibility to doing so.¹⁴⁴

Fourth, the grievance committees, those part attorney/part non-attorney groups evaluating complaints for probable cause, may be doing a more thorough job of finding probable cause in more recent years where perhaps previously none was found. The increasing diversification of the Bar membership,¹⁴⁵ trickling down to participation on the grievance committees charged with finding probable cause, may be better able to follow through with disciplinary actions that in the past may have been overlooked.¹⁴⁶ When combined with increased non-lawyer (consumer) sensitivity to professional regulation, it may be possible that grievance committees are being more thorough.

C. The Gender Gap

The most striking difference in the numbers of disciplines that we found was by gender. Although it is clear that the number of women members of the Bar is growing, the percentage of women being disciplined is very low compared to the number of male attorneys being disciplined, considering the percentage of women members in the Bar.¹⁴⁷

143. FLA. BAR ONLINE, CONSUMER PAMPHLET: COMPLAINT AGAINST A FLORIDA LAWYER, at <http://www.flabar.org/tfb/TBFCConsum.nsf/48e760203493b82ad852567090070c9b9/c5b7d247a0c9c45/c5b7d247a0c9c45a85256b2f006c6186?OpenDocument> (last visited Mar. 27, 2004).

144. Internet usage continues to increase. According to one report, the amount of Americans online has increased from 84.6 million to 116.5 million from December 1998 to August 2000 alone. Group Samasco, *A Comparison of Increased Internet Usage Among Various Demographic Groups*, at <http://rhetcomp.gsu.edu/~gpullman/3140/samasco.doc> (last visited Mar. 27, 2004).

145. *Young Lawyers Work to Promote Diversity and Gender Sensitivity*, FLA. B. NEWS, Dec. 1, 2002, at 21.

146. In March 15, 2000, *The Florida Bar News* reported that the ABA was very concerned with increasing minority attorney members and was creating a scholarship bank to fund minority law school scholarships. Mark D. Killian, *ABA President: Increasing Diversity Is the Issue of Our Time*, FLA. B. NEWS, Mar. 15, 2000, at 12. In September 2, 2001, *The Florida Bar News* reported that 89% of the Bar population was white, 2% was black, and 8% Hispanic. Mark D. Killian, *Emphasizing a Diverse Bench*, FLA. B. NEWS, Sept. 1, 2001, at 4.

147. The Florida Bar has the highest percentage of women currently in its history, at 29.5% as of October 1, 2003. FLA. BAR ONLINE, FREQUENTLY ASKED QUESTIONS: HOW

Table 2: Total Disciplines in Florida Bar by Gender/Percentage*

| Year | Total Disciplines | Disciplines by Gender** | Percentage of Discipline* M/W** |
|-------------|--------------------------|--------------------------------|--|
| 1988 | 149 | 140M/9W | 94%M / 6%W |
| 1989 | 136 | 128M/8W | 94%M / 6%W |
| 1990 | 151 | 146M/5W | 97%M / 3%W |
| 1991 | 147 | 138M/9W | 94%M / 6%W |
| 1992 | 196 | 182M/14W | 93%M / 7%W |
| 1993 | 188 | 168M/20W | 89%M / 11%W |
| 1994 | 187 | 167M/20W | 89%M / 11%W |
| 1995 | 177 | 158M/19W | 89%M / 11%W |
| 1996 | 202 | 185M/17W | 92%M / 8%W |
| 1997 | 202 | 179M/23W | 89%M / 11%W |
| 1998 | 273 | 241M/31W | 88%M / 11%W |
| 1999 | 217 | 197M/20W | 91%M / 9%W |
| 2000 | 250 | 221M/29W | 88%M / 12%W |
| 2001 | 281 | 242M/39W | 86%M / 14%W |
| 2002 | 217 | 188M/24W | 87%M / 11%W |

There are several possible reasons for the wide gender gap in disciplinary actions. First of all, the gender gap in the Bar is still wide. Although The Florida Bar is currently nearly thirty percent women, our data revealed

MANY LAWYERS ARE LICENSED TO PRACTICE LAW IN FLORIDA?, at <http://www.flabar.org/tbf/flabarwe.nsf/f6301f4d554d40a385256a4f006e6566/47fcoa8f415a11d2852> (last visited Mar. 27, 2004).

* Numbers may not always add up to total; some attorneys were not able to be identified by gender. Percentages may not always add up to total; some attorneys were not able to be identified by gender.

** Percentages are rounded up or down using a standard .5 divider.

that the highest percentage of women disciplined was fourteen percent, in 2001.¹⁴⁸

The most plausible explanation for the greater number of men being disciplined is the gender difference in the *history* of the Bar.¹⁴⁹ Although women are joining the Bar at a growing rate, the longer attorneys are in practice, the more likely they are to have some claim made against them.¹⁵⁰ Therefore, newly admitted attorneys are not being disciplined at the same rate as the more experienced attorneys. These more experienced attorneys are generally men, and, therefore, higher numbers of men are being disciplined.

There may be many reasons for new attorneys being disciplined at lower rates. New attorneys may not be responsible for clients directly.¹⁵¹ Since the grievance process against attorneys generally commences with a complaint by a client directly, new attorneys who work for a partner, who is responsible for direct client contact, may not be brought into the Bar grievance process. In these instances, the attorney of record would be subject to discipline should there be a problem with the handling of the case.¹⁵²

In addition, many larger firms have structured supervision programs for new attorneys beginning their careers.¹⁵³ Even if a new attorney is directly responsible for client contact, an attorney who may be formally and closely supervised by an experienced attorney will not likely make a mistake that would affect the client, and thus, would not generate a complaint against him.¹⁵⁴ Many small firms may not have the time or budget for such supervi-

148. *Id.*

149. The number of women in the Bar has grown dramatically. Jan Pudlow, *Women in The Florida Bar*, FLA. B. J., Apr. 2000, at 56. According to a 2000 issue of *The Florida Bar Journal*, there were 175 women lawyers that were Florida Bar members in 1966. *Id.* at 59. "By 1975, there were 684 out of 20,247" total Florida lawyers (3.3 percent); by 1980 the percentage of women lawyers in Florida was up to 7.3 percent. *Id.*

150. This thought is usually articulated in the context of malpractice lawsuits, and accounts for malpractice rates generally rising with years of experience in practice. JAY G. FOONBERG, *HOW TO START AND BUILD A LAW PRACTICE* 368 (Millennium 4th ed. 1999).

151. See Wyatt, Tarrant & Combs, LLP at <http://www.wyattfirm.com/training.html> (last visited Mar. 27, 2004) [hereinafter Wyatt]. The law firm of Wyatt, Tarrant & Combs, LLP, serving Kentucky, Tennessee, and Indiana with more than 200 lawyers offers details on their website regarding the role of associates and the pride senior partners take in their training. *Id.*

152. R. REGULATING FLA. BAR 4-1.5.

153. Wyatt, *supra* note 151.

154. Hansen, *supra* note 5, at 33.

sion programs, which may also be a reason why solo and small-firm attorneys are being disciplined at a higher rate.¹⁵⁵ Many attorneys begin their careers in larger firms and then split off into smaller firms, where they can take a larger role in the running of the business. However, by leaving their supervisors behind, attorneys are more vulnerable to mistakes that ultimately may result in discipline by The Florida Bar.¹⁵⁶

Our thoughts about newer members (in this look, translating to female) bore out in our brief examination of attorneys by year admitted to the Bar. According to reliable figures for Bar admissions for attorneys disciplined in 2001 and 2002, show that the new members of the Bar are not the largest, nor even the second largest, experienced group getting disciplined.¹⁵⁷ In fact, in 2001, about sixty-six percent of all disciplines came from those practicing ten to thirty years; while in 2002, about seventy percent of all disciplines fell in that group.¹⁵⁸ So, even though women membership may be growing quickly within the Bar, it may be ten years or more before we see the percentages of women disciplined coming in line with the membership numbers.

Table 3: Disciplines by Year Admitted to Bar¹⁵⁹

| Year of Discipline | Member 0-10 years | Member 10-20 years | Member 20-30 years | Member 30-40 years | Member 40-50 years | Member 50+ years |
|--------------------|-------------------|--------------------|--------------------|--------------------|--------------------|------------------|
| 2001 | 49 | 102 | 83 | 31 | 6 | 1 |
| 2002 | 42 | 85 | 67 | 20 | 1 | 2 |

155. *Id.*

156. *Id.* (echoing an explanation by Virginia L. Ferrara, New Mexico's chief disciplinary counsel).

157. *See* Table 3: Disciplines by Year Admitted to Bar.

158. *Id.*

159. Nine attorneys' admittance dates were unable to be ascertained.

Other explanations for the low number of women being disciplined, other than Bar membership, may be consumer oriented. Young women attorneys can find themselves being treated differently than men by their clients.¹⁶⁰ It is possible that clients are treating women differently in many ways, including the discipline process.¹⁶¹ It is also possible that grievance committees are treating women differently than male attorneys in finding probable cause in cases involving women.¹⁶² Some believe that women are more socialized to communicate, which may result in better client communications than those of male attorneys.¹⁶³ While there are no factual situations documenting this type of behavior in The Florida Bar disciplinary process, the overall treatment of women in the law leads to this possibility.¹⁶⁴

D. Geography

Another factor that we examined in total Bar disciplines was the county where the disciplined attorney practiced. The results were generally unsurprising: the higher the population; the higher or greater Bar disciplines. But within this data, there were exceptions.

160. Galina Davidoff, *Warm Body or a Key Player: Getting People to Care that You Were There*, DQ LIBRARY: DECISIONQUEST ARTICLES: at <http://www.decisionquest.com/site/dqlib74.htm> (last visited Mar. 27, 2004).

161. The summary of a study on women in the legal profession found many differences in the perception of women as a gender category, rather than as an individual, in the areas of client satisfaction and development. Cynthia Fuchs Epstein et. al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 302-05 (1995). In addition, some believe that projecting a powerful personal communication style does not come naturally to most women. Maret McCoy, *Career Survival Skills for Women*, at http://i.b52.net/i/u/565138/i/Career_Survival_Skills_for_Women.doc (last visited Mar. 27, 2004).

162. Cf. Epstein et al., *supra* note 161.

163. Amy Singer, *Women Attorneys at a Disadvantage in Combative Courtrooms? Think Again*, at <http://www.trialconsultants.com/Library/WomenAttorneysDisadvantage.html> (last visited Mar. 27, 2004).

164. *Id.* "[T]he norms of the legal workplace reflect a male culture." *Beyond the Billable Hour*, LAWYERS LIFE COACH.COM, at <http://www.lawyerslifecoach.com/newsletters/issue27.html> (last visited Mar. 27, 2004).

Table 4: Disciplines Sorted by County and Year

| Year | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|-----------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Alachua | 3 | 1 | 3 | 2 | 3 | 1 | 6 | 2 | 3 | 3 | 4 | 2 | 3 | 5 | 4 |
| Bay | 3 | 0 | 2 | 1 | 0 | 3 | 1 | 0 | 2 | 1 | 2 | 0 | 0 | 1 | 1 |
| Bradford | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 |
| Brevard | 0 | 0 | 5 | 3 | 3 | 2 | 2 | 2 | 2 | 5 | 3 | 9 | 6 | 3 | 5 |
| Broward | 22 | 23 | 14 | 26 | 17 | 23 | 24 | 25 | 36 | 25 | 28 | 27 | 27 | 40 | 24 |
| Charlotte | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 3 | 1 | 1 | 3 |
| Citrus | 0 | 0 | 2 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 3 | 2 | 0 | 2 | 1 |
| Clay | 0 | 1 | 1 | 1 | 2 | 4 | 3 | 0 | 1 | 1 | 1 | 0 | 0 | 3 | 2 |
| Collier | 2 | 1 | 0 | 0 | 3 | 1 | 1 | 0 | 1 | 2 | 2 | 3 | 1 | 4 | 5 |
| Columbia | 0 | 1 | 2 | 0 | 2 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 |
| De Soto | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Duval | 9 | 8 | 3 | 5 | 8 | 7 | 6 | 10 | 6 | 5 | 11 | 6 | 6 | 5 | 4 |
| Escambia | 4 | 3 | 3 | 1 | 1 | 0 | 0 | 0 | 5 | 0 | 7 | 3 | 5 | 2 | 2 |
| Flagler | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| Franklin | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Gadsden | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 0 |
| Hamilton | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| Hendry | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 2 | 0 |
| Hernando | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 | 2 | 0 | 1 | 0 | 0 |

2004]

ATTORNEY DISCIPLINE IN FLORIDA

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| Year | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|--------------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Highlands | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 2 | 0 | 1 |
| Hillsborough | 21 | 13 | 10 | 8 | 13 | 18 | 18 | 21 | 17 | 12 | 19 | 8 | 13 | 21 | 8 |
| Indian River | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| Jackson | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | | | | | | | |
| Jefferson | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Lake | 0 | 3 | 0 | 1 | 1 | 0 | 1 | 1 | 3 | 1 | 3 | 0 | 1 | 0 | 0 |
| Lee | 4 | 3 | 4 | 6 | 2 | 0 | 2 | 1 | 1 | 4 | 2 | 3 | 0 | 3 | 3 |
| Leon | 1 | 3 | 3 | 0 | 1 | 2 | 5 | 3 | 2 | 2 | 6 | 9 | 6 | 5 | 7 |
| Levy | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Liberty | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| Manatee | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 0 | 0 | 0 | 1 | 1 | 3 | 1 | 1 |
| Marion | 3 | 3 | 5 | 1 | 1 | 0 | 6 | 5 | 1 | 0 | 1 | 3 | 3 | 3 | 1 |
| Martin | 0 | 2 | 0 | 1 | 1 | 2 | 1 | 2 | 2 | 1 | 4 | 1 | 4 | 2 | 4 |
| Miami-Dade | 24 | 29 | 35 | 27 | 43 | 49 | 33 | 32 | 45 | 48 | 54 | 49 | 64 | 72 | 52 |
| Monroe | 3 | 1 | 0 | 1 | 1 | 2 | 0 | 1 | 0 | 2 | 2 | 0 | 1 | 0 | 2 |
| Okaloosa | 0 | 0 | 1 | 3 | 1 | 1 | 0 | 1 | 0 | 2 | 3 | 0 | 2 | 5 | 1 |
| Orange | 8 | 3 | 7 | 7 | 11 | 5 | 6 | 6 | 16 | 14 | 18 | 15 | 13 | 10 | 11 |
| Osceola | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 3 | 1 | 0 | 0 | 0 | 1 | 1 | 2 |
| Out of State | 7 | 6 | 16 | 13 | 19 | 11 | 13 | 12 | 17 | 13 | 22 | 26 | 30 | 29 | 22 |
| Palm Beach | 1 | 1 | 0 | 0 | 4 | 0 | 1 | 1 | 0 | 2 | 3 | 0 | 1 | 1 | 1 |

| Year | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|-----------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Pasco | 3 | 2 | 4 | 2 | 0 | 4 | 3 | 0 | 5 | 2 | 4 | 5 | 1 | 2 | 2 |
| Pinellas | 9 | 9 | 10 | 12 | 22 | 26 | 18 | 13 | 10 | 15 | 27 | 11 | 22 | 21 | 9 |
| Polk | 6 | 11 | 8 | 8 | 10 | 14 | 13 | 16 | 14 | 13 | 15 | 13 | 19 | 17 | 23 |
| Putnam | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| St. Lucie | 3 | 1 | 2 | 5 | 4 | 3 | 3 | 2 | 0 | 2 | 3 | 3 | 2 | 4 | 6 |
| St. Johns | 4 | 0 | 1 | 0 | 2 | 0 | 0 | 0 | 1 | 2 | 1 | 0 | 1 | 3 | 0 |
| Sara Rosa | 0 | 0 | 0 | 0 | 2 | 1 | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 1 | 0 |
| Sarasota | 2 | 0 | 1 | 4 | 3 | 1 | 4 | 3 | 1 | 4 | 5 | 3 | 1 | 1 | 3 |
| Seminole | 0 | 0 | 0 | 1 | 1 | 0 | 1 | 0 | 0 | 1 | 2 | 0 | 0 | 1 | 0 |
| Sumter | 0 | 3 | 0 | 1 | 3 | 2 | 3 | 2 | 1 | 0 | 5 | 2 | 4 | 2 | 3 |
| Suwannee | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 |
| Taylor | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| Union | 2 | 2 | 3 | 0 | 0 | 1 | 0 | 1 | 3 | 3 | 2 | 2 | 0 | 0 | 0 |
| Volusia | 1 | 0 | 3 | 2 | 7 | 2 | 4 | 2 | 2 | 3 | 3 | 7 | 5 | 4 | 2 |
| Wakulla | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 |
| Walton | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 |
| TOTAL | 149 | 136 | 151 | 147 | 196 | 188 | 187 | 177 | 202 | 202 | 273 | 217 | 250 | 281 | 217 |

Some counties experienced little change over the years.¹⁶⁵ On the other hand, other counties whip-lashed from no attorney discipline to a fairly large number based on attorney population and history.¹⁶⁶ There are several plausible explanations for these results.

The first data we noticed was the greater number of attorneys disciplined in Miami-Dade County.¹⁶⁷ However, the population of Miami-Dade County is greater than anywhere else in the state.¹⁶⁸ More people translate to more potential clients, and, thus, may mean more cases and more opportunities for something to go wrong. The percentage of disciplines brought against attorneys with business addresses in Miami-Dade County has not changed dramatically, despite the otherwise growing absolute numbers.¹⁶⁹ Despite such an enormous population in the county, the county has not had a dramatic population growth; therefore, it is not surprising that the percentage of total disciplines in Miami-Dade County has not dramatically grown.¹⁷⁰

In other counties where population growth has been larger, discipline rates have grown slightly, in appropriate comparison to the larger population.¹⁷¹ In addition, it is important to note that, like many other professional

165. See Table 6.

166. *Id.*

167. *Id.*

168. U.S. DEP'T OF COMMERCE—U.S. CENSUS BUREAU, CENSUS 2000 DATA FOR THE STATE OF FLA. POPULATION FOR THE 15 LARGEST COUNTIES AND INCORPORATED PLACES: 1990 AND 2000, available at http://www.census.gov/Press-Release/www/2001/tables/redist_fl.html (last visited Mar. 27, 2004) [hereinafter FLA. CENSUS 2000]. The 2000 Census as reported by the University of Florida Bureau of Economic Research listed the Florida population (in thousands, rounded to hundreds) at 15,982.4, and the population of Miami-Dade county at 2,253.4. *Id.* The next largest county was Broward, at 1,623.0 and then Palm Beach County at 1,131.2. *Id.* Although the overall population numbers were smaller in the 1990 Census, Miami-Dade County still ranked the most populous, followed by Broward and then Palm Beach Counties as well. *Id.*

169. *Id.*

170. FLA. CENSUS 2000, *supra* note 168. Although the population of Florida as reported from the 1990 to 2000 Census increased from 12,938.0 (in thousands, rounded to hundreds) to 15,982.4, Miami-Dade County population only increased from 1,937.1 to 2,253.4, a growth of approximately sixteen percent. *Id.* Compare this to the growth in smaller counties such as Orange county, which grew from 677.5 to 896.3, a growth of approximately thirty-two percent. *Id.*

171. See Table 4: Disciplines sorted by county and year; FLA. CENSUS 2000, *supra* note 168.

industries, attorneys' decisions to work in metropolitan areas are likely to follow population growth, not precede it.¹⁷²

Table 5: Out-of-State Disciplines¹⁷³

| Year | Total Disciplines | Disciplines Attributed to Attorneys from Out-of-State | Percentage Disciplines for Out-of-State Attorneys |
|------|-------------------|---|---|
| 1988 | 149 | 7 | 5% |
| 1989 | 136 | 6 | 4% |
| 1990 | 151 | 16 | 11% |
| 1991 | 147 | 13 | 9% |
| 1992 | 196 | 19 | 10% |
| 1993 | 188 | 11 | 6% |
| 1994 | 187 | 13 | 7% |
| 1995 | 177 | 12 | 7% |
| 1996 | 202 | 17 | 8% |
| 1997 | 202 | 13 | 6% |
| 1998 | 273 | 22 | 8% |
| 1999 | 217 | 26 | 12% |
| 2000 | 250 | 30 | 12% |
| 2001 | 281 | 29 | 10% |
| 2002 | 217 | 22 | 10% |

172. Phillip L. Clay, *Choosing Urban Futures: The Transformation of American Cities*, 1 STAN. L. & POL'Y REV. 28, 39 (1989).

173. This table is based on attorneys, published by The Florida Bar, who have an out of state address. It does not take into account where the cases that caused the discipline were handled.

One geographic group that has seen a sharp rise in discipline is the attorneys with out-of-state addresses.¹⁷⁴ From a low in 1989 of only four percent to a high of twelve percent in 2001, the number of attorneys being disciplined from out-of-state is a strong force.¹⁷⁵

There may be several reasons for such a large percentage of out-of-state attorneys disciplined in Florida. First, as we become a more mobile society, the numbers of attorneys claiming out-of-state addresses may have grown—attorneys become licensed and then move, or may hold licenses in multiple states by design. As the number of out-of-state attorneys grows, so does the number of cases, resulting in more potential violations by this group. Second, the grievance committees may be more active in following up on problems involving Florida-licensed attorneys with out-of-state addresses. Third, The Florida Bar rules allow for reciprocal discipline, when an attorney is disciplined in another state.¹⁷⁶ For example, if an attorney is disbarred for an offense in another state in which he or she may be licensed, the Florida Bar may reciprocally revoke his/her right to practice in Florida.¹⁷⁷ Such disbarment in Florida would be the result of harm to a client outside of the state, and the process through another state's discipline system to reach such a result, yet would be counted in our statistics as a disbarment. However, these cases cannot be explained by trends within Florida.¹⁷⁸

174. See Table 5: Out-of-State Disciplines.

175. *Id.* More than one in ten attorneys in the years 1999 and 2000 claimed an out-of-state address.

176. FLA. STDS. FOR IMPOSING LAW. SANCS. 2.9, available at <http://www.flabar.org> (last visited Mar. 27, 2004).

177. *Id.*

178. See Table 6.

Table 6: South Florida (tri-county) Disciplines¹⁷⁹

| Year | Total Disciplines | Palm Beach, Broward and Miami-Dade County Disciplines | Percentage of Disciplines in the Tri-County Area |
|-------------|------------------------------|--|---|
| 1988 | 149 | 52 | 35% |
| 1989 | 136 | 63 | 46% |
| 1990 | 151 | 57 | 38% |
| 1991 | 147 | 61 | 42% |
| 1992 | 196 | 70 | 36% |
| 1993 | 188 | 86 | 46% |
| 1994 | 187 | 70 | 37% |
| 1995 | 177 | 73 | 41% |
| 1996 | 202 | 95 | 47% |
| 1997 | 202 | 86 | 43% |
| 1998 | 273 | 97 | 36% |
| 1999 | 217 | 89 | 41% |
| 2000 | 250 | 110 | 44% |
| 2001 | 281 | 129 | 46% |
| 2002 | 217 | 99 | 46% |

179. This table is based on those attorneys licensed by The Florida Bar, that list a Broward, Miami-Dade, or Palm Beach County address. It does not take into account where the cases that caused the discipline were handled.

The South Florida area, taken as a whole, has quite a large percentage of the disciplines ordered each year.¹⁸⁰ In fact, ranging from a low of approximately a third to nearly half of all disciplines, the tri-county South Florida area seems fraught with unethical behavior.¹⁸¹ But is that fair and true?

Not necessarily. First of all, the Palm Beach, Broward and Dade County areas have an enormous population compared to most counties in Florida.¹⁸² Because of this, the sheer number of cases being handled in these counties is tremendous,¹⁸³ and more cases lend to more problems. Second, the population of these counties is both very sophisticated and very ripe for potential unethical behavior. These counties boast metropolitan, well-educated and high income groups, leading to more watchful consumers.¹⁸⁴ In contrast, the tri-county area also contains a great number of new immigrants, who lack full English skills and otherwise are unfamiliar with the legal system and its protections, rendering the tri-county area a breeding ground for unscrupulous attorneys taking advantage of otherwise unknowledgeable clients.¹⁸⁵

In either event, consumers of legal services should not fear working with an attorney in South Florida due to these figures, but may be concerned based on the published accounts. It may be possible that due to the sophistication of the client base, consumers readily accept these behaviors, however, they may not.

E. "Punishment" for the "Crime"

We then took a closer look at the total grievances handed out each year, and the specific disciplines assessed to each attorney under the process, as demonstrated in Table 7 & 8.

180. See Table 6.

181. *Id.*

182. FLA. CENSUS 2000, *supra* note 168.

183. See UNIV. OF FLA., BUREAU OF ECON. & BUS. RESEARCH., FLORIDA STATISTICAL ABSTRACT § 22 (2001) (tabulating by county the criminal justice system statistics in Florida).

184. See *id.* § 4.00 (tabulating Florida's educational statistics).

185. *Id.* at tbl. 1.91 (tabulating number of immigrants "admitted by country of birth and intended residence in specified metropolitan areas of Florida").

Table 7: Florida Disciplines by Category Percentages¹⁸⁶

| Year | Total | Disbar | Suspend | Resigned | Reprimand | Public Repri- | Probation | Unkown |
|------|-------|--------|---------|----------|-----------|------------------|-----------|--------|
| 1988 | 149 | 17% | 46% | 9% | 0% | 25% | 1% | <1% |
| 1989 | 136 | 15% | 50% | 13% | 1% | 20% | 0% | <1% |
| 1990 | 151 | 15% | 36% | 16% | 3% | 28% | 3% | 0% |
| 1991 | 147 | 13% | 42% | 18% | 0% | 26% | <1% | 0% |
| 1992 | 196 | 16% | 38% | 16% | 0% | 28% | 1% | <1% |
| 1993 | 188 | 10% | 54% | 17% | <1% | 16% | 1% | 2% |
| 1994 | 187 | 12% | 48% | 15% | <1% | 22% | <1% | 1% |
| 1995 | 177 | 10% | 54% | 9% | 8% | 14% | 5% | <1% |
| 1996 | 202 | 15% | 54% | 9% | 17% | 5% | 1% | 0% |
| 1997 | 202 | 12% | 47% | 15% | 12% | 10% | 3% | <1% |
| 1998 | 273 | 14% | 55% | 13% | 8% | 5% | 4% | 0% |
| 1999 | 217 | 10% | 53% | 18% | 13% | 2% | 4% | 0% |
| 2000 | 250 | 15% | 52% | 10% | 14% | 5% | 4% | 0% |
| 2001 | 281 | 10% | 53% | 11% | 18% | 3% | 4% | <1% |
| 2002 | 217 | 14% | 47% | 13% | 24% | 0% | 2% | 0% |

186. Percentages rounded up or down using a standard .5 rounding scheme. Thus, percentage totals may add up to more than 100%.

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Table 8: Disciplines, Behavior and Year¹⁸⁷

| 1988 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 6 | 8 | 1 | 11 |
| Suspension | 25 | 10 | 5 | 29 |
| Resigned | 2 | 3 | 3 | 2 |
| Probation | 1 | 1 | 0 | 0 |
| Reprimand/ Public Reprimand | 20 | 9 | 6 | 2 |

| 1989 | Professional Misconduct t | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|---------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 4 | 3 | 2 | 12 |
| Suspension | 15 | 12 | 9 | 31 |
| Resigned | 6 | 0 | 5 | 6 |
| Probation | n/a | n/a | n/a | n/a |
| Reprimand/ Public Reprimand | 14 | 6 | 1 | 5 |

187. In each of these tables, numbers may not add up to totals for a particular year as some specific behaviors or disciplines were undecipherable from our data.

| 1990 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 3 | 1 | 9 | 9 |
| Suspension | 24 | 4 | 7 | 19 |
| Resigned | 6 | 5 | 9 | 4 |
| Probation | 3 | 0 | 0 | 2 |
| Reprimand/ Public Reprimand | 30 | 4 | 4 | 6 |

| 1991 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 5 | 2 | 2 | 10 |
| Suspension | 20 | 15 | 15 | 12 |
| Resigned | 15 | 1 | 6 | 5 |
| Probation | 1 | n/a | n/a | n/a |
| Reprimand/ Public Reprimand | 17 | 13 | 6 | 2 |

| 1992 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 11 | 6 | 5 | 9 |
| Suspension | 24 | 16 | 14 | 21 |
| Resigned | 14 | 4 | 2 | 12 |
| Probation | n/a | 1 | 1 | n/a |
| Reprimand/ Public Reprimand | 27 | 21 | 4 | 3 |

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| 1993 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 4 | 5 | 5 | 4 |
| Suspension | 36 | 21 | 14 | 30 |
| Resigned | 16 | 7 | 4 | 5 |
| Probation | 1 | 1 | n/a | n/a |
| Reprimand/ Public Reprimand | 18 | 14 | 0 | 0 |

| 1994 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 5 | 5 | 4 | 8 |
| Suspension | 20 | 33 | 14 | 20 |
| Resigned | 12 | 2 | 3 | 9 |
| Probation | n/a | n/a | n/a | 1 |
| Reprimand/ Public Reprimand | 12 | 28 | 2 | n/a |

| 1995 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 4 | 6 | 1 | 6 |
| Suspension | 40 | 22 | 16 | 17 |
| Resigned | 12 | 2 | 1 | 1 |
| Probation | 3 | 1 | 2 | 3 |
| Reprimand/ Public Reprimand | 19 | 14 | 4 | 1 |

| 1996 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|----------------------------|-------------------------------------|-----------------------------|-----------------------------------|
| Disbarment | 9 | 9 | 8 | 5 |
| Suspension | 40 | 30 | 19 | 18 |
| Resigned | 8 | 1 | 7 | 2 |
| Probation | 1 | 0 | 1 | 0 |
| Reprimand/ Public Reprimand | 25 | 16 | 1 | 1 |

| 1997 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|----------------------------|-------------------------------------|-----------------------------|-----------------------------------|
| Disbarment | 12 | 6 | 2 | 4 |
| Suspension | 39 | 19 | 13 | 24 |
| Resigned | 6 | 8 | 12 | 5 |
| Probation | 4 | 1 | 1 | 0 |
| Reprimand/ Public Reprimand | 35 | 7 | 3 | 0 |

| 1998 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|----------------------------|-------------------------------------|-----------------------------|-----------------------------------|
| Disbarment | 8 | 15 | 8 | 7 |
| Suspension | 68 | 21 | 29 | 31 |
| Resigned | 5 | 4 | 16 | 11 |
| Probation | 8 | 1 | 1 | 1 |
| Reprimand/ Public Reprimand | 25 | 7 | 3 | 2 |

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| 1999 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 8 | 8 | 1 | 5 |
| Suspension | 50 | 25 | 15 | 24 |
| Resigned | 7 | 4 | 12 | 16 |
| Probation | 7 | 1 | 0 | 0 |
| Reprimand/ Public Reprimand | 27 | 1 | 4 | 1 |

| 2000 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 7 | 14 | 4 | 11 |
| Suspension | 42 | 39 | 5 | 42 |
| Resigned | 5 | 1 | 3 | 14 |
| Probation | 7 | 1 | 0 | 3 |
| Reprimand/ Public Reprimand | 30 | 5 | 2 | 0 |

| 2001 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|-------------------------|----------------------------------|--------------------------|--------------------------------|
| Disbarment | 5 | 13 | 6 | 3 |
| Suspension | 53 | 51 | 11 | 26 |
| Resigned | 2 | 7 | 6 | 16 |
| Probation | 8 | 0 | 1 | 1 |
| Reprimand/ Public Reprimand | 53 | 2 | 4 | 4 |

| 2002 | Professional Misconduct | Violated Rules Regulating FL Bar | Trust Account Violations | Any Criminal Act or Conviction |
|--------------------------------|----------------------------|-------------------------------------|-----------------------------|-----------------------------------|
| Disbarment | 9 | 8 | 7 | 3 |
| Suspension | 39 | 15 | 23 | 24 |
| Resigned | 8 | 2 | 9 | 8 |
| Probation | 3 | 0 | 0 | 1 |
| Reprimand/ Public Reprimand | 50 | 0 | 2 | 0 |

This data reveals several consistencies and inconsistencies in Bar discipline. First, suspensions, the most widely used category of discipline in each year in total, are generally near the top for each category of misconduct that we analyzed. This across-the-board use of suspensions may be reassuring to consumers. It implies that the offense as a whole is considered, rather than one specific discipline triggering act, and that the appropriate discipline shall be applied from the appropriate rule regulating the Florida Bar. In addition, as a whole, more disbarments and fewer reprimands or probation sanctions were given for more severe types of misbehaviors; while fewer disbarments, and a greater number of lesser sanctions were given for less severe types of infractions of inappropriate behavior.¹⁸⁸ Quite simply, overall, the “punishments” seem to fit the “crimes.”¹⁸⁹

It should be noted that the dispensing of some sanctions has not been consistent. As a consumer might rightly expect, disbarments have been handed out more often for criminal acts or convictions.¹⁹⁰ However, in some years, professional misconduct or rule violations were the largest cause of this severe punishment, while criminal acts or convictions received much less severe sanctions.¹⁹¹ As the specific behavior of the attorney may not be detailed, this apparent disparity between the behavior and the sanction might give rise to some concern by consumers who expect that any criminal activity should result in the loss of a professional license. In addition, some years

188. See Table 8: Disciplines, Behavior and Year.

189. It is important to note, of course, that not all behaviors detailed in Table 9 are actually “crimes” under any definition of that word. See BLACK’S LAW DICTIONARY 370 (6th ed. 1990) (defining a “crime” as a positive or a negative act in desecration of the law).

190. See *id.*

191. *Id.*

reported (e.g. 1989, 1994, 1996) very few sanctions (e.g. probation) for attorney misbehavior.¹⁹² Were the activities of the attorneys truly not conducive to that sanction that year? What about those activities that precluded the issuance of that sanction? Or were there other forces in those years pushing for more license-curtailling sanctions? Without the specific files on the misdeeds of attorneys, consumers cannot know and we cannot surmise. But the inconsistent use of sanctions in different calendar years certainly raises some questions in the minds of those reading the reported disciplines.

1. Trust Accounting—A Detailed Look

Trust Account violations get a lot of press in the Bar media.¹⁹³ From the data above, the following synthesis can be made of trust accounting behaviors and corresponding discipline for our fifteen-year period. Table 9 shows the number of total disciplines that were handed out for trust accounting violations each year, and the percentage of total disciplines that trust accounting represents. Table 10 breaks the percentages down by the type of discipline that attorneys received in each year.

192. See Table 6.

193. Barbara Lewis & Dan Otto, *Pesky Procedures*, L.A. DAILY J., June 21, 2001, available at <http://www.centurionconsultinglaw.com/arp23LAWOCT.html> (last visited Mar. 27, 2004).

Table 9: Trust Account Violations by Discipline Given

| | Total Disciplines that Year | Total Trust Account Violations of those Disciplined | Percentage of Disciplines for Trust Accounting |
|-------------|--|--|---|
| 1988 | 149 | 15 | 10% |
| 1989 | 136 | 17 | 12.5% |
| 1990 | 151 | 29 | 19.2% |
| 1991 | 147 | 29 | 19.7% |
| 1992 | 196 | 26 | 13.3% |
| 1993 | 188 | 23 | 12.2% |
| 1994 | 187 | 23 | 12.3% |
| 1995 | 177 | 24 | 13.6% |
| 1996 | 202 | 36 | 17.8% |
| 1997 | 202 | 31 | 15.4% |
| 1998 | 273 | 57 | 20.9% |
| 1999 | 217 | 32 | 14.8% |
| 2000 | 250 | 14 | 5.6% |
| 2001 | 281 | 28 | 10.0% |
| 2002 | 217 | 41 | 18.9% |

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Table 10: Trust Accounting Disciplines by Percentage of Penalty Given¹⁹⁴

| | Total | Disbarment | Suspension | Resigned | Probation | Reprimand/ Public Reprimand |
|-------------|-------|------------|------------|----------|-----------|--------------------------------|
| 1988 | 15 | 7% | 33% | 20% | 0% | 40% |
| 1989 | 17 | 12% | 53% | 29% | 0% | 6% |
| 1990 | 29 | 31% | 24% | 31% | 0% | 14% |
| 1991 | 29 | 7% | 52% | 21% | 0% | 21% |
| 1992 | 26 | 19% | 54% | 8% | 4% | 15% |
| 1993 | 23 | 22% | 61% | 17% | 0% | 0% |
| 1994 | 23 | 17% | 61% | 13% | 0% | 9% |
| 1995 | 24 | 4% | 67% | 4% | 8% | 17% |
| 1996 | 36 | 22% | 53% | 20% | 3% | 3% |
| 1997 | 31 | 7% | 42% | 39% | 3% | 10% |
| 1998 | 57 | 14% | 51% | 28% | 2% | 5% |
| 1999 | 32 | 3% | 47% | 38% | 0% | 13% |
| 2000 | 14 | 29% | 36% | 21% | 0% | 14% |
| 2001 | 28 | 21% | 39% | 21% | 4% | 14% |
| 2002 | 41 | 17% | 56% | 22% | 0% | 5% |

There are many resources to assist Florida attorneys with trust accounting, including The Florida Bar, the rules, the “Practicing with Professionalism,” and Law Office Management Advisory Service (“LOMAS”).¹⁹⁵ This branch of The Florida Bar provides forms, resources, and in-person consultations to assist with the running of a trust account.¹⁹⁶

194. Percentages rounded up or down by +/- .5 standard.

195. FLA. BAR ONLINE, MEMBER SERVICES: LAW OFFICE MANAGEMENT ASSISTANCE SERVICE, at <http://www.centurionconsultinglaw.com/arp23LAWOCT.html> (last visited Mar. 27, 2004).

196. *Id.*

The act of trust accounting by attorneys is at its heart, a fiscal responsibility.¹⁹⁷ That makes the information from 1998 particularly troubling to consumers—more than one-fifth of reported disciplines for attorneys exhibited some breach in this responsibility. However, a mere two years later, less than six percent of disciplines for that year were for the same category of misdeed. But the improvement did not last, as two years after that low, the percentage of disciplines of trust violations rose again, almost matching its highest point.

A consumer is left with many questions. Why the improvement in behavior by attorneys concerning trusts? Was there a backlash following the 1998 high? Was the position taken by The Florida Bar more relaxed following the year 2000? The ultimate question, raised at the beginning of this analysis, takes root here as well: Is it good to have a high percentage of disciplines for trust accounting because it demonstrates that this egregious problem is being addressed by The Florida Bar? Or is it bad that there are so many to begin with? Does a “low” percentage of disciplines in trust accounting mean good fiscal sense by attorneys, or are a number of attorneys just getting away with it?

Finally, for those being caught by The Florida Bar, are the sanctions appropriate? The most widely used sanction for trust accounting problems are sanctions. Sanctions, which will temporarily halt the attorney from the practice of law, seems an appropriate remedy for such infractions because it gives the Bar and the attorney time to work through any trust accounting inconsistencies, and to ensure that all financial responsibilities are in order before the fiscal practices continue. But is the punishment enough for failure to follow the rules, which are clearly at the heart of an attorney’s responsibility?¹⁹⁸ Obviously, the number of violations for trust accounting is higher than any consumer would like to see. On the other hand, reprimands of all types have declined, which also seems appropriate for the grave nature of trust accounting responsibilities.

197. See R. REGULATING FLA. BAR 5-1.1.

198. This concept is taken directly from, and with thanks to, Professor James Repetti of Boston College Law School, whom, in a class titled “Taxation I” given in the 1991-92 academic year, ended the full year, six-credit course by reminding the class, “When you work as an attorney, you will handle lots of other people’s money. It is not yours. Don’t take it.” Professor James Repetti, Address at Taxation I, Boston College Law School (1991-1992).

2. Specific Thoughts About Criminal Behavior

For purposes of our study, we classified all criminal allegations or convictions of any type in the same category, as long as the information published about the attorney was considered a conviction or allegation of criminal activity. This classification precluded Florida Bar rule violations or other inappropriate behavior. Not all actions by attorneys were prosecuted; however, they were all the basis for the discipline.

Table 11: Criminal Allegations/Violations as Disciplines Given

| | Total Disciplines that Year | Total Criminal Acts, Convictions, or Violations of those Disciplined | Percentage of Disciplines in Each Year Given for Criminal Activity |
|-------------|--|---|---|
| 1988 | 149 | 44 | 29.5% |
| 1989 | 136 | 54 | 39.7% |
| 1990 | 151 | 40 | 26.5% |
| 1991 | 147 | 29 | 19.7% |
| 1992 | 196 | 45 | 23.0% |
| 1993 | 188 | 39 | 20.8% |
| 1994 | 187 | 38 | 20.3% |
| 1995 | 177 | 28 | 15.8% |
| 1996 | 202 | 26 | 12.9% |
| 1997 | 202 | 33 | 16.3% |
| 1998 | 273 | 52 | 19.1% |
| 1999 | 217 | 46 | 21.2% |
| 2000 | 250 | 70 | 28.0% |
| 2001 | 281 | 50 | 17.8% |
| 2002 | 217 | 36 | 16.6% |

Table 12: Criminal Behavior Disciplines by Penalty Given

| | Total | Disbarment | Suspension | Resigned | Probation | Reprimand Public Reprimand |
|-------------|-------|------------|------------|----------|-----------|-------------------------------|
| 1988 | 44 | 25% | 66% | 5% | 0% | 5% |
| 1989 | 54 | 22% | 57% | 11% | 0% | 9% |
| 1990 | 40 | 23% | 48% | 10% | 5% | 15% |
| 1991 | 29 | 35% | 41% | 17% | 0% | 7% |
| 1992 | 45 | 20% | 47% | 27% | 0% | 7% |
| 1993 | 39 | 10% | 77% | 13% | 0% | 0% |
| 1994 | 38 | 21% | 53% | 24% | 3% | 0% |
| 1995 | 28 | 21% | 61% | 4% | 11% | 4% |
| 1996 | 26 | 19% | 69% | 8% | 0% | 4% |
| 1997 | 33 | 12% | 73% | 15% | 0% | 0% |
| 1998 | 52 | 14% | 60% | 21% | 2% | 4% |
| 1999 | 46 | 11% | 52% | 35% | 0% | 2% |
| 2000 | 70 | 16% | 60% | 20% | 4% | 0% |
| 2001 | 50 | 6% | 52% | 32% | 2% | 8% |
| 2002 | 36 | 8% | 67% | 22% | 3% | |

Similar questions arise upon examination of the percentage of annual disciplines attributable to criminal behavior. Ranging from a high in 1989 of nearly forty percent of the disciplines being attributable to some type of criminal behavior, to a low of about thirteen percent in 1996. It is clear that criminal activity of varying degrees is responsible for discipline actions in Florida. One question that arose as we reviewed these numbers is, considering the stringent character and fitness background check that the Bar performs, why are the number of instances of criminal misconduct so high

among Florida licensed attorneys?¹⁹⁹ Does the fault lie with the screening process of admitting attorneys to be licensed? Or does the problem come later, in the legal profession, that is, from the attorney being exposed to temptations, environments, or incentives that otherwise cause later criminal behavior? Are the stress levels in the profession so high as to drive attorneys to varying types of misconduct?

Second, we questioned the connection between sanction and behavior. We combined all criminal misconduct into one category, (including misdemeanors and any criminal activity unrelated to an attorney's practice of law). Some of the sanctions given over the years have changed. However, we do not know whether the specific underlying behaviors have actually changed. It seems clear that in the earlier years of our study, disbarment was a more common sanction in this category of behavior, and resignation less common; but the two seem to have switched places in terms of frequency. Florida's discipline system has forced more attorneys, who have engaged in criminal misbehavior, to take the proactive step of resigning, rather than waiting to see the outcome of a disbarment proceeding. Other sanctions given in any year for this type of misbehavior have remained consistently proportional—they remain consistent as to their relativity of frequency to other sanctions (i.e., more suspensions, and fewer probations). However, the actual numbers in any given year stay generally in proportion to the total number of disciplines in each year. In our view, this consistency bodes well for The Florida Bar system of discipline.

IV. CONCLUSION

The public's view of The Florida Bar is likely an overall positive one. Looking at the overall numbers of disciplines, the percentages of disciplines, and the process which The Florida Bar has for self-regulation is an encouraging experience for anyone concerned about putting trust into professionals. The public should be further encouraged by the strides that the Bar has made in recent years in assisting clients in reporting problems with attorneys, through programs like the ACAP. Other educational directives, such as increasing the number of hours of ethical training attorneys must take in their

199. See FLA. BAR ADMISS. R. 5-10.

Continuing Legal Education Credits are also good indicators of the Bar's drive to succeed in self-regulation.²⁰⁰

On the other side, there are some questions about the regulation of attorneys. Notwithstanding the most comprehensive character and fitness screenings in the country, there are still quite a few attorneys disciplined each year for involvement in criminal and other misbehaviors that consumers may believe could be "screened out" in the process of admission to The Florida Bar.²⁰¹ Many attorneys live high-pressure lifestyles, which can result in these missteps. But those utilizing the legal services of an attorney may be wondering whether The Florida Bar should be taking more preventative measures to prevent potentially unfit attorneys from entering this profession fraught with potential for misstep.

In addition, a review of our data causes us to urge for more practical education in trust accounting policies and specifically, detailed education regarding the *Rules Regulating the Florida Bar*.²⁰² The Bar needs to undertake these education programs, perhaps in conjunction with legal education institutions.

In addition, while the regulatory process itself seems to be working, is there another way to handle complaints and cases that would be more efficient, while preserving the rights of all parties involved? Should more non-lawyers be involved in probable cause hearings? Should more non-lawyers be involved in the post probable cause hearing stages of discipline? In addition, we wonder what affect the discipline process has on ultimate sanctions if it rests in the hands of the Supreme Court of Florida. Considering the Court already has an over logged docket, combined with the given potential

200. FLA. BAR ONLINE, CENTER FOR PROFESSIONALISM: CLE GUIDELINES, at <http://www.flabar.org/tfb/TFBProfess.nsf/840090c16eedaf0085256b61000928dc/72e302f839a78f9d85256b2f006ccdc1?OpenDocument> (last visited Mar. 27, 2004). In 1997 the Florida Bar instituted the five credit ethics requirement. *Id.*

201. FLA. BAR ADMISS. R. 2-21.

202. Currently, all newly licensed members of The Florida Bar under Rule 6-12.1 (with some exceptions by employment) are required to complete a continuing legal education course entitled "Practicing with Professionalism" (formerly known as Bridge-the-Gap) within twelve months of being admitted. R. REGULATING FLA. BAR. 6-12.3. Purportedly, many of these issues are being covered in this two day seminar, but it is the belief of many licensed attorneys that this program does not go deep enough. This requirement has special rules for out-of-state Florida Bar members under Florida Bar Rules. R. REGULATING FLA. BAR 6-12.4.

for plea bargaining and the large number of probable cause findings throughout the state, the result is unclear.

The Florida Bar is very open with the public about basic information regarding its members. A searchable directory is available online, and the public may contact the "Membership Records" line to inquire about a specific attorney.²⁰³ But the information available to the public regarding the self-regulation process is not as forthcoming. The main source of publication of the discipline records is a members-purposed newspaper, and a members-focused website. While both resources are available to the public—and in fact, parts of the website are specifically designed for the public—no report is compiled to make this information readily available. In an October 1, 2003 article on the review of the grievance process, The Florida Bar reported 197 more disciplinary sanctions than any source available to the public, which is a serious problem regarding access to information.²⁰⁴ The public's evaluation of a profession and the profession's self-evaluation can build trust and respect between the public and that profession. All attorneys could benefit from a boost in this relationship.²⁰⁵

While there may not be answers to these questions right now, it is important to note that in our societal time of corporate trouble, the public is paying attention to the ethical and professional actions of the professionals who serve them. It is clear from our study that lawyers in Florida are being watched. The question now becomes: Who does the Bar want watching them?

203. FLA. BAR ONLINE, ORGANIZATION: ATTORNEY SEARCH, at <http://www.flabar.org/Membership.nsf/MESearch?OpenForm> (last visited Mar. 27, 2004). The Membership Records Department for The Florida Bar may be reached at (850) 561-5832. *Id.*

204. See Blankenship, *supra* note 18.

205. See Scott Baranick, *Respect No Joke for this Lawyer*, ST. PETERSBURG TIMES, July 4, 2002, at 1A.

THE TECHNOLOGY CHALLENGE: LAWYERS HAVE FINALLY ENTERED THE RACE BUT WILL ETHICAL HURDLES SLOW THE PACE?

LYNN A. EPSTEIN*

| | | |
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Lawyers are notoriously slow in adapting technology into their practice. In fact, many technology experts opine that lawyers were never in the race. Nonetheless, as technology has developed, specifically targeted at the legal field, many lawyers have begun to incorporate the technology into their daily activities because it simplifies the practice of law. However, as attorneys now race to incorporate technology into their legal practice, they must also confront novel ethical issues that will inevitably arise as lawyers enter cyberspace. In this regard, technology and ethics have been on a collision course for several years. This was recognized recently when the American Bar Association ("ABA") undertook two significant studies aimed to analyze precisely how technology fits into a lawyer's daily practice.

In an attempt to clarify legal practice in cyberspace, many rules governing professional conduct have been altered. In 2002, the *Model Rules of Professional Conduct* were significantly amended.¹ Albeit nearly a decade late,

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1. MODEL RULES OF PROF'L CONDUCT (amended 2002). In February and August of 2002, the ABA House of Delegates approved many changes to the Model Rules. *Inside the Bar: Wisconsin Influences ABA's MJP Position; Provides Diploma Privilege*, Sept. 2002, at

the rules began to address what the practice has long recognized: many lawyers employ virtual technology to carry out many facets of their legal practice. Commensurate with this recognition, a separate ABA task force set out to conduct a legal profession technological survey.² The apparent goal of this independent survey was to apprise the overall membership on the specific technical methodology and tools lawyers use in their daily professional practices. A comparative analysis of these two important works can allow lawyers to effectively evaluate the benefits and ethical risks of incorporating specific technological tools into their daily practice regimen.

The purpose of this article will be to examine many aspects of a typical lawsuit in the context of the various technology options available to attorneys. The *2002 Legal Technology Survey* ("Technology Survey") will be analyzed to aid in determining which technological tools lawyers use in their daily practice. Next, the article will apply the *2002 Model Rules of Professional Conduct* ("Model Rules") to many of the technological tools highlighted in the Technology Survey, in practicable application, to gauge the ethical challenges facing the tech-savvy practitioner. Finally, the article will provide a template setting forth the best outline of conduct for attorneys to effectively balance the demands of competing in a technology-driven world against the new Model Rules technology-directed ethical considerations.

I. DOES IT RAIN IN THE WORLD WIDE WEB?

One need not travel far into the World Wide Web before discovering a plethora of destinations for the tech-savvy rainmaking attorney, aiming to attract clients through effective web marketing and advertising. Attorneys seek promotional exposure in sites such as Martindale-Hubbell® and its Lawyers.com website. This destination initially serves as a link to lawyers in many different practice specialties throughout many various geographic regions.³ Searching the site, one then discovers direct links to the selected law firm's site. Martindale-Hubbell® is certainly not alone in this offering. Indeed, Lawquote.com asks that a potential client fill out a particularized ques-

<http://www.wisbar.org/newsletter/2002/09/wiam.html>. "Ethics 2000" was the popular name given to the ABA Commission that proposed the major changes. Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, http://www.abanet.org/cpr/e2k-mlove_article.html (last visited Mar. 15, 2004).

2. ABA, LEGAL TECH. RES. CTR., SURVEY REPORT: LITIGATION AND COURTROOM TECHNOLOGY (2002), TECHNOLOGY [hereinafter LITIGATION & COURTROOM]. The Legal Technology survey was a 155 question survey distributed to 17,352 ABA lawyer members in private practice in the United States. The research center received 3,094 responses. The report is published in five volumes. *Id.* at iii.

3. See <http://www.lawyers.com> (last visited Mar. 27, 2004).

tionnaire, which then serves as a fundamental search guide to match the eager client with a suitable law firm.⁴ Following this link, it is up to the attorney or law firm to then contact the client to meet, discuss the client's needs, and seal a deal for representation.⁵ Lawyersinternetguide.com is a site that also serves to match a potential client with a lawyer.⁶ The sweetener in this arranged match is that the site promises the client seeking representation a "free consultation" once a match is confirmed.⁷

By virtue of the offerings found in cyberspace, it is readily apparent that tech-savvy attorneys know how to design offerings aimed at attracting clients through impressive and stylistic website design (the lure) combined with easy linkage opportunities (the catch). Overall, most law firm sites contain the following: the "law firm contact information; biographical data for each firm member; profiles of the firm's practice areas; copies of the firm[s] newsletters" (often uploaded in easy to read Adobe® pdf format); and "articles written by firm members."⁸ In addition however, today's website design technology can do more than simply pass on a firm's basic information. Impressive websites carry a tremendous amount of valuable information to potential clients. One immigration law firm, Siskind, Susser, Haas & Chang has reported phenomenal success with its web offering.⁹ In addition to the standard attorney biographies, the site holds hyperlinks that instantly transport the reader of the firm's informational page to any one of more than 300 articles written by firm members.¹⁰ The dynamic site also provides an online publicly-available immigration newsletter subscribed to by more than 9,000 people.¹¹ The site stores a document collection containing complete texts of new immigration legislative bills with links to valuable immigration Internet resources.¹² E-mail contact points are positioned in key locations through the site.¹³ These points include a consultation questionnaire that allows potential clients to consult by telephone, internet voice, or video-conference with a

4. See <http://www.lawquote.com> (last visited Mar. 27, 2004).

5. See *id.*

6. *LawyersInternetGuide.com: Your Online Source to an Attorney Near You*, at <http://www.lawyersinternetguide.com> (last visited Mar. 27, 2004).

7. See *id.*

8. Michael L. Goldblatt, *Planning a Successful Law Firm Web Site*, 47 LA. B. J. 117 (1999).

9. Greg Siskind, *How to Build a 'Virtual' Law Firm*, 18 PA. LAW. 14 (1996). Mr. Siskind is a partner in the above recognized firm which has offices in Knoxville, Memphis, Nashville, and Toronto. *Id.* at 17 n.1.

10. *Id.* at 14.

11. *Id.*

12. *Id.* at 16.

13. Siskind, *supra* note 9, at 16.

firm practitioner.¹⁴ Potential clients can also log on for periodic real-time chats with one of the firm's immigration lawyers.¹⁵ Harnessed to this incredible web offering, from its inception in 1992 to 1998, the firm went from a little known law firm to a well-known successful firm whose site records 50,000 hits per week.¹⁶

Websites are not the only virtual tool available to attorneys interested in employing the Internet to attract clients. E-mail distribution lists or listservs are another method of effectively marketing a firm.¹⁷ Many lawyers report joining existing listservs that focus on specific areas of the law while making valuable contacts. Internet sites such as Yahoo!® Groups are a good example of listservs that provide information on a variety of topics and interests.¹⁸ Alternately, many law firms choose to simply set up listservs for their existing clients, potential clients, and even other lawyers by hiring companies like Customzines.¹⁹ Customzines inputs listserv data, designs the accompanying newsletter, and is responsible for e-mailing the offering to each entity/person on the list.²⁰

Many law firms report success in the use of one of two listserv types: announcements only lists or Internet discussion lists.²¹ The announcement only listserv includes information of interest to a certain group.²² Contrariwise, "interactive discussion lists" are designed so that each recipient can take part in a subsequently-scheduled, interactive discussion.²³

Attorneys have made great forays into the virtual marketing world. According to the Technological Survey, a majority of attorneys, 64.39%, have law firm homepages.²⁴ Even though a majority of lawyers have some form of a website, the content among legal websites varies tremendously. For

14. *Id.*

15. *Visalaw.com, The Immigration Law Portal of Siskind Susser*, at <http://www.visalaw.com> (last visited Mar. 27, 2004).

16. Siskind, *supra* note 9, at 14.

17. Patrick M. Byers, *Marketing Gets a Cyber-Boost*, N.Y.L.J., Sept. 14, 1998, <http://www6.law.com/ny/tech/091498s4.html>.

18. *Yahoo!® Groups*, at <http://groups.yahoo.com> (last visited Mar. 27, 2004).

19. *Customzines.com*, at <http://www.customzines.com> (last visited Mar. 27, 2004).

20. *Id.*

21. Larry Bodine, *Listserves Bring Law Firms New Business*, LEGAL BIZ ONLINE, May 2001, at http://www.martindale.com/xp/Martindale/Professional_Resources/LegalBiz_Online/Legal_Marketing/01_05_4.xml (last visited Mar. 15, 2004).

22. *Id.* Baker and Mackenzie is an example of a firm with a popular listserv that sends out information to more than 10,000 recipients, including corporate counsel, CIO, and IT professions. *Id.*

23. *Id.*

24. ABA, LEGAL TECH. RES. CTR., SURVEY REPORT: WEB AND COMMUNICATION TECHNOLOGY, 133 (2002) [hereinafter WEB & COMMUNICATION].

example, only 4.17% of those lawyers with a website provide an online client intake questionnaire,²⁵ 10.13% provide online legal self help guides,²⁶ 1.30% provide real-time consultations with prospective clients,²⁷ and only 6.23% provide online form preparation.²⁸

In theory, the apparent dearth of advertising in the polled attorneys' web offerings may be explained as an extreme hesitancy to violate perceived ethical obligations. The Model Rules addresses some of these perceived concerns. Rule 7.2 of the *Model Rules of Professional Conduct* ("Rule 7.2") was amended to include electronic communication as an acceptable form of advertising.²⁹ In clarifying the rule, the comments allow a lawyer to pay for online directory listings,³⁰ and specifically allow a lawyer to pay for a "qualified lawyer referral service."³¹ Thus it would appear that Rule 7.2 creates a safe harbor in which it is ethically permissible for an attorney to use the online directory vehicle to mine potential business.

Ethical concerns arise when one isolates the specific content in an attorney's website. Those law firm websites that invite people to e-mail them or even offer an online free consultation may unknowingly create an attorney-client relationship. Specifically, Rule 1.18 of the *Model Rules of Professional Conduct* ("Rule 1.18"), a new addition to the rules in 2002, serves to categorize and define a class of prospective clients with a corollary set of obligations owed by an attorney to a client.³² Rule 1.18 defines a prospective client as one who discusses with the lawyer the possibility of forming an attorney-client relationship.³³ Once a client is deemed a prospective client, the lawyer must guard confidential information and make sure the lawyer does not have an impermissible conflict of interest.³⁴

The comments to Rule 1.18 make it clear that a person who communicates unilaterally with a lawyer has not become a prospective client.³⁵ However, although Rule 1.18 does not specifically mention cyberspace contact,

25. *Id.* at 144.

26. *Id.* at 152.

27. *Id.* at 146.

28. *Id.* at 148.

29. MODEL RULES OF PROF'L CONDUCT R. 7.2 (a) (2003). "Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." *Id.*

30. *Id.* at cmt. 5.

31. *Id.* at cmt. 6. A "qualified lawyer referral service" is one that is approved by an appropriate regulatory association, such as the ABA. *Id.*

32. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2003).

33. MODEL RULES OF PROF'L CONDUCT R. 1.18(a).

34. MODEL RULES OF PROF'L CONDUCT R. 1.18(b)-(c).

35. MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 2.

the bright line may be crossed when lawyers issue an invitation for communication to a potential (virtual) client through the lawyer's website. The Model Rules encourage the inclusion of specific disclaimers³⁶ for attorney advertising. Hence, many law firms have followed this caution by prominently displaying disclaimers disavowing any attorney-client relationship.³⁷

While attempting to land a client without creating an unintended attorney-client relationship, some lawyer communications, on their face, are considered unethical as an improper solicitation. Rule 7.3 of the *Model Rules of Professional Conduct* ("Rule 7.3"), amended in 2002, now includes real-time electronic contact as a method of improper solicitation, if the significant motive for the communication is pecuniary gain.³⁸ Thus, lawyers who enter chat rooms, with the specific intention of obtaining clients through this interaction, would appear to be treated no differently than a lawyers who lurk in hospital emergency rooms in search of clients, or lawyers who telephone potential clients' homes and asks if they have been in an accident. All are subject to ethical violations for solicitation in violation of Rule 7.3.

However, while chat rooms are frowned upon to secure business, Rule 7.3(c) draws distinction when considering e-mails such as those generated by listservs.³⁹ Rule 7.3(c), amended in 2002 to allow electronic communications if the words "Advertising Material" are included in the communication, is now consistent with the identical requirement as applied to written or recorded communication.⁴⁰ Thus as long as attorneys comply with the advertising designation, e-mail communications to potential clients appear to be acceptable under Rule 7.3(c).⁴¹ Of course, attorneys must be careful not to inundate potential clients with e-mail. Such harassment may not only violate

36. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2003). The rules suggest attorneys use disclaimers as a way to discourage clients from unjustified expectations as the result of advertising. *Id.*

37. See also Moskowitz & Moskowitz, at <http://www.lawyers.com/mm-law/index.jsp> (last visited Mar. 27, 2004). This is the website address of the law firm of Moskowitz & Moskowitz. This firm's website contains the following disclaimer: "This web site is designed for general information only. The information presented at this site should not be construed to be formal legal advice nor the formation of a lawyer/client relationship." *Id.*

38. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2003).

39. MODEL RULES OF PROF'L CONDUCT R. 7.3, cmt. 3.

40. MODEL RULES OF PROF'L CONDUCT R. 7.3(c).

41. *Id.*

anti-spam laws,⁴² but can also constitute improper solicitation by harassment under the Model Rules.⁴³

II. ARE YOU LISTENING? COMMUNICATING WITH YOUR CLIENT THROUGH VIRTUAL TECHNOLOGY

Once the client hires the attorney, maintaining contact can constitute a challenging and often misunderstood task. Many ethical investigations arise over clients' complaints that their lawyers failed to communicate in an adequate manner concerning their legal representation.⁴⁴ The live face-to-face client meeting is the traditional means of discussing matters with clients. This tried and true method provides advantages to both lawyer and client. However, live face-to-face client meetings can be costly and time consuming. With the increased specialization of the legal field, and with the advantage of information gleaned off the internet, it may soon be commonplace for a client in Florida to discover that the best qualified intellectual property (patent) attorney is located in McLean, Virginia. An initial virtual meeting may certainly be preferable and cost effective to the client. Once retained, many lawyers simply do not set aside time for client chats, which equates to billing downtime. In those instances, frequent e-mail updates and live online question/answer sessions serve as a more economical and precise mode to maintain client contact while assuring that an attorney performs zealously and economically.

Historically, the telephone served as a traditional alternative to face-to-face meetings. However, reviewing documents necessitates coordinating the phone and fax machines. Further, if the client ultimately needs to sign documents, the documents must be faxed to the client, signed and sent back, prompting numerous delays.

42. More than half the states regulate spam, albeit with little success. See generally, Dannielle Cisneros, *Do Not Advertise: The Current Fight Against Unsolicited Advertisements*, 2003 DUKE L. & TECH. REV. 10 (2003).

43. See MODEL RULES OF PROF'L CONDUCT R. 7.3(b)(2) (stating that solicitation involving harassment is prohibited). See also Gail A. Forman, *To Infinity, and Beyond: The ABA Re-Examines the Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, 1 J. LEGAL ADVOC. & PRAC. 96 (1999) (stating even though the Model Rules are not directly responsive to spam e-mail, many Internet service providers have set up programs to prevent this type of solicitation).

44. See Nancy J. Moore, *Revisions, Not Revolution: Targeting Lawyer/Client Relations, Electronic Communications, Conflicts of Interest*, 88 A.B.A. J. 48 (Dec. 2002) (stating that the most frequent client complaint is lack of communication by lawyers, and the Model Rules have responded by requiring lawyers put more of their communications in writing).

Up-to-date technology can provide the benefits of face-to-face meetings combined with the benefits of telephone and fax machine contact. Inexpensive video cameras adorn many new personal computer packages. The videoconferencing tool is therefore available to the most enterprising law firms.⁴⁵ Alternatives to videoconferencing include Internet Relay Chat ("IRC"), which allows parties to engage in real-time conversation when typing over a computer screen.⁴⁶ Through the use of a chat box, the parties exchange text.⁴⁷ Private conversations may include two or more individuals. With the inclusion of white-board software, documents can be simultaneously viewed and discussed along with typed conversation over the internet.⁴⁸ Thus, a client meeting, complete with document exchange and review, can be handled from offices located anywhere internet access is available in the world.

Assuming the client and attorney agree on a real-time first interview, once it has occurred, the attorney can send a retainer agreement over the internet. With the advent of e-signatures,⁴⁹ the client can review the retainer agreement, digitally sign it, and return the signed document to his/her attorney.

If an attorney's computer arsenal is not IRC compatible, a client meeting may also be accomplished via e-mail. Documents may be scanned and attached to e-mail for review. Although the meeting is not conducted in real-time, the relatively small amount of time it takes to exchange e-mail may actually result in more thoughtful and efficient communication. In fact, e-mail is an excellent source of routine attorney-client communication. In many instances, e-mail can be sent "certified" with a requested return receipt from the client. E-mail is automatically time and date stamped. Copies of e-mail should be placed in a client's correspondence file for later reference.

45. See Hugh Calkins, *Videoconferencing: When Getting There Isn't Half the Fun, Now's the Time to Depose, Meet, and Confer on Camera*, 17 ME. B.J. 6, 7 (2002).

46. See Hon. Jefferson Lankford, *Talking Shop: Chat Up Your Practice on the Internet*, 38 ARIZ. ATT'Y 12 (2001).

47. *Id.* at 13.

48. Jesse J. Richardson, Jr., *How a Sole Practitioner Uses The "Electronic Office" To Maintain A Competitive Law Practice*, 3 DRAKE J. AGRIC. L. 141, 149 (1998).

49. See Bradley J. Hillis, *A Review of Electronic Court Filing in the United States*, 2 J. APP. PRAC. & PROCESS 319, 324 (2000). Any procedure that associates a document with a person is considered an e-signature. *Id.* at 325. An attorney or client may simply type their names, "preceded by '/s/' denoting 'signed.'" *Id.* Additionally, parties usually sign agreements that e-signed documents are the equivalent to personally signed documents. *Id.*

The Technology Survey revealed that most attorneys have not used videoconferencing.⁵⁰ In fact, most attorneys stated videoconferencing was not available at their firms.⁵¹ However, for those attorneys that do use videoconferencing, the most popular use of videoconferencing was with their clients.⁵²

While use of videoconferencing is rare, attorneys responded that they use e-mail quite often. Approximately 97% of attorneys employ e-mail some of the time, while 80% use e-mail one or more times per day.⁵³ E-mail is most often used for routine correspondence with clients.⁵⁴ Sixty-three percent use e-mail to correspond about case status.⁵⁵ Sixteen percent use e-mail to bill their clients.⁵⁶ Attorneys also revealed they felt comfortable sending attachments with their e-mail, with 91.54% reporting having sent an attachment through e-mail.⁵⁷

The most commonly perceived ethical issue associated with e-mail is the attorney's concern over protecting confidential information. In 1999, the ABA issued a formal opinion⁵⁸ concluding that it was perfectly alright to send an e-mail over the Internet without taking any extra precautions to preserve confidential information.⁵⁹ The opinion expressed the belief that e-mail affords a reasonable expectation of privacy, and that it was no different in terms of protecting confidentiality than a fax or regular mail.⁶⁰ The new Model Rules echo the formal opinion, and in the accompanying comments, states the lawyer does not have to use special security measures or encryptive devices, if the method of transmission affords a reasonable expectation of privacy.⁶¹ The comments proceed, however, to caution an attorney that special circumstances may warrant more protective measures, such as whether the e-mail contains sensitive material or whether the information contained therein is protected by law or by a confidentiality agreement.⁶²

Additionally, for the first time, the Model Rules address the ethical consequences arising when a confidential communication finds its way into the

50. WEB & COMMUNICATION, *supra* note 24, at 195 (finding that 70.36% of attorneys surveyed have not used videoconferencing).

51. *Id.* at 193. (76.61%).

52. *Id.* at 197. (26.1%).

53. *Id.* at 166. (79.90%).

54. *Id.* at 168. (96.1%).

55. WEB & COMMUNICATION, *supra* note 24, at 168.

56. *Id.*

57. *Id.* at 169.

58. ABA Comm. on Ethics and Prof'l Resp., Formal Op. 99-413 (1999).

59. *Id.* The extra precautions contemplated by the committee would be encryption. *Id.*

60. *Id.*

61. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (2003).

62. *Id.*

wrong e-mail box, along with the resultant effect on lawyer-client confidentiality.⁶³ Rule 4.4(b) of the *Model Rules of Professional Conduct* ("Rule 4.4") generally addresses the consequences that arise when confidential e-mail information arrives to the wrong in-box.⁶⁴ Rule 4.4 now mandates that lawyers who inadvertently receive an e-mail, that they know "was inadvertently sent, shall promptly notify the sender."⁶⁵ The comments leave open the question as to whether the pre-existing privileged information loses its designation due to the inadvertent disclosure.⁶⁶

The Technology Survey results indicate most attorneys follow the Model Rule's lack of concern over protecting confidentiality over the Internet.⁶⁷ Approximately 80% of those attorneys surveyed send confidential communications to their clients by e-mail.⁶⁸ Approximately 51.5% of those surveyed revealed they sent confidential communicative e-mail on a daily or weekly basis.⁶⁹ In order to protect confidentiality, a majority of those surveyed revealed they relied on a confidentiality statement included within the e-mail.⁷⁰ Of those responding, only 17.7% employ encryption methods to protect the e-mail and/or attached documentation content, while 14.3% require clients to provide oral or written consent.⁷¹ Twenty percent of those surveyed reported using email to transmit confidential communications, yet took no precautions at all.⁷²

III. DISCOVERY: TECHNOLOGY ALLOWS ONE ATTORNEY TO TAKE THE PLACE OF AN ENTIRE LITIGATION TEAM, SAVING COSTS TO THE CLIENT

In the area of discovery, technology advanced furthest in the taking of deposition testimony. For example, assume an attorney represents one of 500 defendants in an asbestos litigation. An exposure witness deposition is scheduled to occur some 300 miles from the attorney's office. The attorney

63. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2003).

64. *Id.*

65. *Id.*

66. *Id.* at cmt. 2.

67. WEB & COMMUNICATION, *supra* note 24 at 183.

68. *Id.* at 181 (noting that 20.58% never send confidential communications to clients by e-mail).

69. *Id.* (noting that 23.30% of attorneys send confidential communications one to four times per week, while 28.23% send confidential communications one or more times per day).

70. *Id.* at 183 (noting that 54.2% of attorneys responding rely on confidentiality statement accompanying the transmission).

71. *Id.*

72. WEB & COMMUNICATIONS, *supra* note 24 at 183.

doubts there will be any testimony obtained that would pertain to his client's defense, yet he is reluctant to abstain from attending. Enter I-Dep, LLC, an Illinois-based enterprise hosting the www.i-dep.com website.⁷³ I-Dep's helpful technology allows attorneys to attend and participate in depositions online.⁷⁴ The service allows attorneys, who choose to refrain from attending to view a deposition online via live streaming video which may be seen on the attorneys' personal computers.⁷⁵ I-Dep allows for two-way audio feeds in order to permit the "monitoring" attorney to hear the deponent and attorneys present at the discovery proceeding.⁷⁶ The technology also allows the "monitoring" attorney to pose questions to the witness.⁷⁷ The I-Dep technology also sustains a private text messaging sector, so that monitoring lawyers may type private questions and comments to the lead attorney at the deposition.⁷⁸ Not only is the private text messaging an advantage to attorneys, but this feature also permits clients and experts to monitor a deposition online, without the expense of traveling to the deposition.⁷⁹ Online users are provided with a password to log into the deposition, but no additional software is needed to run I-Dep's program.⁸⁰

While online depositions are extremely efficient for multiparty litigation, the technology may exceed the small firm or solo practitioner's budget. Attorneys who do attend live depositions still have some high-tech options that may increase the efficiency and quality of the deposition process. For example, the attending lawyer can benefit from multimedia depositions.⁸¹ Multimedia depositions combine digital audio and video with a computer assisted transcript.⁸² Thus, an attorney may view the transcript during the deposition on his laptop, and make notes as the transcript is being produced.⁸³ While an attorney reviewing and making notes during an ongoing deposition has the potential to become as annoying as the mistimed cell phone ring, t The process still should save the attorney review time and make

73. See <http://www.i-dep.com> (last visited Mar. 27, 2004) [hereinafter I-Dep.].

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See I-Dep.

79. *Id.*

80. *Id.*

81. Julie K. Plowman, *Multimedia in the Courtroom: A Valuable Tool or Smoke and Mirrors?*, 15 REV. LITIG. 415, 417 (1996).

82. See generally *id.* Multimedia refers to systems that integrate onto a computer base two or more types of media, such as video and digital audio. *Id.* at 416.

83. See generally *id.*

for a more thorough deposition.⁸⁴ Of course, a multimedia deposition is also preserved for trial, complete with testimony scrolling features.⁸⁵

A less technical alternative to the multimedia format is the videotaped deposition. As attorneys and courts have come to rely on the videographer and videotape deposition format to preserve discovery testimony, it has become as commonplace as the written transcript and court reporter.⁸⁶

The Technology Survey reflects 94.59% of the polled bar members have never participated in an online deposition.⁸⁷ Of the attorneys who have participated in an online deposition, only 1.08% do so with any type of frequency.⁸⁸ The main reasons cited for not participating in online depositions were lack of knowledge about the technology, and lack of knowledge about the process.⁸⁹ Only approximately 5% reported court and financial constraints as the reasons for nonparticipation in online depositions.⁹⁰

The Model Rules do not specifically address online depositions. This omission is probably because the technological procedure is rarely used, and undoubtedly courts will structure their own rules of procedure governing the virtual discovery mechanism. Despite the omission, online depositions can present ethical concerns.⁹¹ For example, would all individuals "attending" the deposition need to be listed?⁹² If not, would the failure to list all "attending" individuals be viewed as an ethical violation of candor toward the tribunal?⁹³ By failing to disclose all those present, the party harboring undisclosed attendees may have withheld information from the court. Additionally, if an expert is online providing input to an attorney taking part in the deposition, would that online communication between the expert and the attorney be discoverable as information imparted in the company of third parties beyond

84. *Id.*

85. *Id.*

86. See generally Donald F. Parsons, Jr. & Lisa K.W. Crossland, *Technological Tools for Civil Litigation*, 14 DEL. LAW. 33 (1996). Even with a videotaped deposition, many courts still require an "official" court reporter and transcript. *Id.*

87. WEB & COMMUNICATION, *supra* note 24, at 130.

88. *Id.* at 130. Only 1.08% of attorneys participate in an online deposition one to three times per month) *Id.*

89. *Id.* at 132. Showing a reported 52.1% nonparticipation due to lack of knowledge about the technology, while 55.5% reported lack of knowledge about the process. *Id.*

90. WEB & COMMUNICATION, *supra* note 24, at 132. With 5.5% reporting firm financial constraints while 5.0% reported court constraints. *Id.*

91. See Hope Viner Samborn, *Click Onto World Wide Web Deps: Services Offer Real - Time Advantages, But They're Tempered by Ethics Issues*, 86 A.B.A. J. 72, 73 (Oct. 2000).

92. *Id.*

93. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (2003) (noting "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation").

the typical work product privilege? If so, failure to disclose may constitute a concealment of evidence in violation Rule 3.4 of the *Model Rules of Professional Conduct*, as being unfair to opposing counsel.⁹⁴ Online depositions may also provide the opportunity for virtual “attending” witnesses to listen into other deponent’s (another witnesses) testimony without disclosing the “attending” witness’ presence to the other side.⁹⁵ If not a violation of specific rules, it would appear that failing to disclose all those virtual attendees would at least constitute a violation of Rule 8.4 of the *Model Rules of Professional Conduct*, as conduct that is misleading and dishonest.⁹⁶

IV. LEGAL RESEARCH AND WRITING: BRINGING THE LAW LIBRARY TO THE DESKTOP PC AND BEYOND

Legal research on the internet is a high techies’ paradise. Unfortunately, the volume of material attorneys can research is so overwhelming that it may in fact be over productive. Lawyers have three basic options in using on line research: 1) general Internet research; 2) CD-ROM data-based research; and 3) LexisNexis™ and Westlaw® thin client-based research.

Free general Internet research may translate to initial money savings, but it also may be the most frustrating exercise, equivalent to finding the proverbial “pin in the haystack.” By choosing a search engine such as the ever popular Google™ you simply type in search terms and *voila* your search has probably resulted in 350,000 items which must be culled over.⁹⁷ Lawyers may opt to enter chat rooms or discussion groups looking for legal expertise.⁹⁸ Alternatively, intrepid researchers might narrow the search by employing a law-based search engine such as FindLaw®,⁹⁹ one of the most expansive law-based search engines on the Internet. Using FindLaw, a lawyer is able to search all court systems and retrieve most major statutory codes, making the search engine a good general legal search mechanism.¹⁰⁰ Missing

94. MODEL RULES OF PROF’L CONDUCT R. 3.4(d) (2003) (stating that a lawyer shall make a reasonably diligent effort to comply with discovery requests). *See also* MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 2 (noting that evidentiary material includes computerized information).

95. Samborn, *supra* note 91, at 72.

96. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2003).

97. *See* <http://www.google.com> (last visited Mar. 27, 2004).

98. *See* <http://www.abanet.org/discussions> (last visited Mar. 27, 2004). The ABA web site entertains many discussion groups and listservs. *Id.*

99. *See* <http://findlaw.com> (last visited Mar. 27, 2004).

100. *Id.*

of course from FindLaw® are research specific directories and citator services.¹⁰¹

As a viable alternative to the legal search engine, one might simply resort to searches conducted within an ever-expanding list of court specific sites created to aid legal researchers. For example, the United States Supreme Court maintains a website where one can access Supreme Court decisions dating back to 1980.¹⁰² Most United States Courts of Appeal and United States District Courts maintain similar sites.¹⁰³ Some of these federal court sites contain references to unpublished slip opinions not readily available on any other legal search engine, (including Westlaw® and LexisNexis™).

Attorneys may choose to conduct research using CD-ROMs. CD-ROM virtual library products are usually purchased and updated for a monthly maintenance or license fee. CD-ROM virtual libraries exist for most subject matter specialties and for many state practice guides. CD-ROM virtual libraries are especially beneficial for the small law firm, enabling them to have access to the same traditional library sources carried by large law firms, though due to space and budgetary constraints, such smaller firms in past history were forced to abstain from carrying.

LexisNexis™ and Westlaw® online research mega-centers continue to advance research capabilities. Both companies feature readily accessible online libraries along with intuitive search engines providing access to an extraordinary amount of information through navigable menus, directories, and logical search methodology.¹⁰⁴ Although both services charge access fees, these two entities have made efforts to establish parity in pricing, thereby designing programs which are affordable to the large, medium and small practice lawyer alike.¹⁰⁵ Westlaw® offers options, such as package rates, for the small firm along with affordable monthly payment plans.¹⁰⁶ The company has designed pay-as-you-go programs, such as the single document pay plan and other cost saving methods, which place lawyers from all regions and firms (large, medium and small) on equal footing in the online research industry.¹⁰⁷

101. *Id.* However, FindLaw® does provide a link to <http://www.westlaw.com>. *See id.* For twelve dollars, an attorney is able to retrieve a case by its cite and Shepardize it. *Id.*

102. *See* <http://www.supremecourt.org> (last visited Mar. 27, 2004).

103. *See* <http://www.uscourts.gov> (last visited Mar. 27, 2004).

104. *See* Lexis, at <http://www.lexis.com> (last visited Mar. 27, 2004); *see also* Westlaw, at <http://www.Westlaw.com> (last visited Mar. 27, 2004).

105. *See id.*

106. Westlaw®, at <http://www.westlaw.com> (last visited Mar. 27, 2004).

107. *Id.*

LexisNexis™ and Westlaw® have been forced to adopt more affordable cost programs as a result of healthy competition. For example, Versuslaw is a new fee-based service that retrieves appellate court cases from all fifty states.¹⁰⁸ One may sign up for the program on a monthly basis or a per project basis (one opinion at a time).¹⁰⁹ Other fee base services will come to you instead of you signing onto them. For example, Lois Law Watch™ monitors Federal District Courts in your designated area of interest and alerts you by e-mail of significant decisions in those areas.¹¹⁰

The Technology Survey concludes that most attorneys use both free online resources for legal research as well as fee-based resources. Approximately 80% of those polled reported using some form of fee-based legal research.¹¹¹ Similarly, 71% of those surveyed revealed they also use free research web sites.¹¹² Attorneys most often start research projects with a fee based service.¹¹³ Attorneys practically never use chat rooms¹¹⁴ and rarely use e-mail discussion lists¹¹⁵ as sources for legal research. Other more advanced research options were used sparingly. Approximately 50% never use e-mail case alert services¹¹⁶ (e.g. www.loislawwatch.com), and 58% never use online advance sheet services.¹¹⁷

Although the use of online research has greatly increased, attorneys have not abandoned researching the old fashioned way, by using books. According to the Technology Survey, lawyers spend practically the same amount of time using print resources as they do with online resources.¹¹⁸ Also, given the proliferation of CD-ROM products, it is somewhat surprising that relatively few lawyers spend much research time using them.¹¹⁹

Online research is perhaps the only area where failure to use the most efficient methods of research may actually cause ethical concerns. The Model Rules governing competence¹²⁰ and fees¹²¹ however, raise potential

108. See <http://www.versuslaw.com> (last visited Mar. 27, 2004).

109. *Id.*

110. See Loislaw, at <http://www.loislaw.com/info/content/global.htm> (last visited Mar. 27, 2004). Lois Law Watch is a service provided by fee based Loislaw, a competitor of LexisNexis™ and Westlaw®. *Id.*

111. ABA, LEGAL TECH. RES. CTR., SURVEY REPORT: ONLINE RESEARCH 169 (2002) [hereinafter ONLINE RESEARCH].

112. *Id.* at 164 (71.54%).

113. *Id.* at 149 (46.01%).

114. *Id.* at 152 (95.30%).

115. *Id.* at 154 (67.27%).

116. ONLINE RESEARCH, *supra* note 107, at 160 (50.70%).

117. *Id.* at 162 (58.15%).

118. *Id.* at 174 (noting 34% of their research time is spent with print materials).

119. *Id.* (noting 12% of their research time is spent with CD-ROM materials).

120. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

ethical issues concerning online research. Rule 1.1 of the *Model Rules of Professional Conduct* is a general rule requiring lawyers to be competent in their legal knowledge, thoroughness, and preparation.¹²² Although this rule and comments are devoid of any mention of technology, an issue may arise whether thoroughness and preparation standards are best served by book or online research. For example, if an attorney has an issue concerning the interpretation of a federal rule of evidence, Westlaw® would be able to provide the attorney in a matter of seconds with every state's analysis of the issue, as well as law reviews and legislative history.¹²³ While that same attorney could conduct the same research through book research, it's unlikely an attorney would have the time or inclination to access all of the hard copy library volumes necessary to produce the same results as that rendered online.¹²⁴ Thus, an attorney's thoroughness and ultimate preparation is greatly enhanced through online research.

A more immediate concern in the area of competence may be the availability of recent court decisions online that are not available as quickly in hard copy.¹²⁵ If an attorney is filing a brief, and a decision was available online before the filing date, but was not available in print, would an attorney be deemed incompetent for not citing that online decision?¹²⁶ While courts may adopt rules governing the duty to report decisions available online before becoming available in print, there would certainly appear to be a competence issue that bar associations may have to confront.

Another related ethical concern would be fee related research costs. Rule 1.5 of the *Model Rules of Professional Conduct* provides that fees and expenses must be reasonable.¹²⁷ As the costs of computerized research declines and most lawyers use online research, a lawyer may have an ethical obligation to use computerized research or cut his billing time for manual research.¹²⁸ For example, in researching the federal evidence problem, if an attorney conducts the research online, he may complete his research in a half hour.¹²⁹ The same research may take four hours by reviewing a collection of books.¹³⁰ If the attorney bills \$200.00 per hour, that would be an \$800.00 fee

121. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003).

122. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

123. See Diane Karpman, *Not Using New Technology: Ethical and Liability Risks? Keep Up or Face Peril* GPSOLO, June 2003, at 23.

124. See *id.*

125. *Id.*

126. See *id.*

127. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003).

128. See Karpman, *supra* note 123, at 24.

129. See *id.*

130. *Id.*

for research using books versus a \$100.00 (\$200/2) fee for electronic research.¹³¹ While the expense of online research would need to be factored into the equation, it is doubtful that the expense would match the \$700.00 difference.¹³² Thus, if the average attorney would use online research and charge \$100.00, the attorney charging \$800.00 may be deemed to have charged an unreasonable fee.¹³³

V. FILING DOCUMENTS ELECTRONICALLY WITH THE COURT: THE RACE TO THE COURTHOUSE JUST BECAME A BLIP ON YOUR SCREEN

Electronic filing of court documents is an extremely efficient and cost-effective method of getting documents from the law office to the courthouse.¹³⁴ When the IRS began to permit electronic filing of tax returns, it paved the way for other governmental offices to use e-mail as a means of receiving documents.¹³⁵ The court system, while initially slow to respond, has begun to make real progress in this area, especially in the federal court system.¹³⁶ Twenty-nine United States District Courts now accept electronic filing to varying degrees.¹³⁷ Fifty-seven United States Bankruptcy Courts allow electronic filing.¹³⁸ All ninety-four United States District Courts plan to allow electronic filing by 2005.¹³⁹

Electronic filing has numerous advantages, including simplifying and standardizing the filing process, and reducing errors in copying and transcription.¹⁴⁰ However, the biggest advantage in electronic filing lies in reducing the costs of printing, copying, and mailing associated with paper documents.¹⁴¹ When courts take that extra step of setting up systems that allow the entire file to be viewed electronically, it enables more people to have access to the system.¹⁴²

131. *Id.*

132. *Id.*

133. See Karpman, *supra* note 123, at 24.

134. See Bradley J. Hillis, *The Digital Record: A Review of Electronic Court Filing in the United States*, 2 J. APP. PRAC. & PROCESS 319 (2000).

135. *Id.*

136. *Id.* at 321.

137. CM/ECF, at http://www.uscourts.gov/cmecf/cmecf_court.html (last visited Mar. 27, 2004).

138. *Id.*

139. *Id.*

140. Robert Plotkin, *Electronic Court Filing: Past, Present, and Future*, 44 BOSTON B. J. 4 (2000).

141. *Id.* at 16.

142. *Id.*

State and federal rules of civil procedure have also paved the way for electronic filing. Many of the federal rules of procedure have been amended to allow courts to permit electronic filing if provided by local rule.¹⁴³ Most jurisdictions have set up technology committees to study the most effective way for courts to implement electronic filing.

However, electronic filing may not be as simple as a click of the mouse. Courts must grapple with specific court rules as to format, font, and type sizes in electronic format.¹⁴⁴ Also, courts must deal with the variety of formats used to convert print images into digital format for a variety of documents.¹⁴⁵ Courts must develop systems that enable a lawyer to easily convert their software programs to court systems.¹⁴⁶ Additionally, as courts adopt electronic filing, most still retain the ability for lawyers to file paper.¹⁴⁷ Dealing with two different filing systems can be complicated and unwieldy. Ultimately, a court may decide to go entirely electronic. If so, either the lawyer must have online capabilities or the court needs to take the time to convert paper to paperless.¹⁴⁸ Both options appear fraught with complications. Thus, with electronic filing, the courts may have to work out the kinks before large scale implementation is possible.

Attorneys are beginning to take advantage of electronic filing. One in five lawyers engaged in electronic document filing at some time.¹⁴⁹ For those attorneys that have filed documents electronically, approximately 95% have been satisfied with the experience.¹⁵⁰ Motions were the most frequently filed documents,¹⁵¹ followed by pleadings.¹⁵² However, the majority of lawyers still delivered documents in person to the courthouse.¹⁵³

The reluctance to file documents electronically would seem to have little to do with impediments with ethical rules. Since electronic filing is controlled by the court system, there is little possibility that lawyers would be

143. See FED. R. CIV. P. 5(b)(2)(D); FED. R. APP. P. 25(a)(2)(D).

144. Hon. Donald E. Shelton, *Electronic Court Filing Presents Both Challenges and Benefits*, <http://www.icle.org/connection/julyaug/celect.htm> (last visited Mar. 27, 2004).

145. *Id.*

146. See generally *id.*

147. *Id.*

148. Michael E. Heintz, Note, *The Digital Divide and Courtroom Technology: Can David Keep up With Goliath?* 54 FED. COMM. L.J. 567, 573 (2002).

149. ABA, LEGAL RES. CTR., SURVEY REPORT: LITIGATION AND COURTROOM TECHNOLOGY 176 (2002). The number of attorneys filing documents electronically has almost doubled since the 2001 Survey. *Id.* at xiv.

150. *Id.* at 180 (stating 50.44% reported they were somewhat satisfied with the experience while 44.25% reported they were very satisfied with the experience).

151. *Id.* at 179 (noting that 66.7% of motions were filed electronically).

152. *Id.* (noting that 61.4% of pleadings were filed electronically).

153. LITIGATION & COURTROOM, *supra* note 2, at 172 (71.50%).

able to act unethically in this area. Local court rules are very specific as to the process and specifications required for electronic filing, thus eliminating competency concerns that may encompass ethical considerations.¹⁵⁴

However, as most courts move towards electronic transmission of documents, lawyers should likewise move toward using this method of transmission. It will no doubt be consistent with the Model Rules, goal of lawyers expediting litigation,¹⁵⁵ by allowing parties to access documents instantaneously. It will also aid the court with an efficient method that eliminates volumes of paper and storage problems.¹⁵⁶ No longer will attorneys race to the courthouse drop box, or search for inventive and creative ways of adding mail days to the due date of their documents. In fact, if lawyers do not at least begin to adopt the process of filing documents electronically, they may find themselves left behind when courts permit only electronic filing.¹⁵⁷

VI. VIRTUAL SHOWCASE: TRIALS AND TECHNOLOGY

Since the vast majority of cases settle before trial, it is possible that an attorney involved in litigation will never have to confront an actual trial and the technology now associated with trying a case. However, given the slim chance an attorney actually has to try a case, technology abounds. First, a few courts have become cutting edge electronic courtrooms, equipped with state of the art technology that aids attorneys, judges, and jurors in the trial process.¹⁵⁸ A wired courtroom includes flat plasma screens, multi-media presentation capabilities, video cameras, real time trial transcript capabilities that will send transcripts to lawyers and judges during a trial, along with video conferencing technology for virtual courtroom testimony and viewing of pre-recorded depositions.¹⁵⁹

Of course, a wired courtroom cannot be appreciated by the sophisticatedly "wireless" counsel. Even when the courtroom does not contain the technological bells and whistles, an attorney can still make good use of advances in technology to present his case. If the courtroom is not wired, many comparable technological tools and display mechanisms can be obtained

154. See e.g., *Case Management/Electronic Case Files (CM/ECF)*, http://www.uscourts.gov/cmecf/cmecf_court.html (last visited Mar. 27, 2004) (providing court instructions for electronic filing for the Northern District of Florida).

155. MODEL RULES OF PROF'L CONDUCT R. 3.2 (2003). Although the focus of this rule is to prevent dilatory practices in litigation, the availability of electronic filing would certainly aid efficiency. MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. 1.

156. Shelton, *supra* note 144.

157. See *id.*

158. Heintz, *supra* note 148, at 570.

159. *Id.*

through equipment rental facilities, who are in the business of helping attorneys effectively present their cases.¹⁶⁰

If high tech is not in the courtroom or in a lawyer's budget, a basic laptop computer may provide many benefits for a trial attorney. First, through the use of litigation support software, a trial attorney is able to store an entire trial file on a couple CD-ROM discs to be accessed through his/her laptop.¹⁶¹ Moreover, a lawyer may be able to provide everyone in the courtroom with visual access to exhibits, pleadings, or deposition testimony.¹⁶² Laptops also enable attorneys to present exhibits through PowerPoint® presentations, complete with graphics and dazzling effects.¹⁶³

In addition to laptops, attorneys may use other types of technology to effectively present their cases. Deposition testimony can be shown through high powered monitors.¹⁶⁴ A full multimedia presentation would include not only the monitor, but also the transcript that scrolls down alongside the deposition video.¹⁶⁵ The transcript can be highlighted, enlarged, and otherwise enhanced for the important testimony.¹⁶⁶

Computer animation and computer simulations are becoming standard in the courtroom. Whether used by experts to explain their theory of a case, or to aid a witnesses' testimony as to how an accident occurred, these computer generated programs bring cases to life.¹⁶⁷ DVD and/or CD-ROM discs are becoming standard fare, replacing the need for traditional video cassette recorders ("VCR") or the old standby poster board.¹⁶⁸ New trial technology can turn any trial into a razzle dazzle high-tech show. The possibilities are endless in using technology for trials. Attorneys need only be careful in their choice and selection from an array of diverse products.¹⁶⁹ While too little technology makes for a sleepy jury, too much technology may mesmerize the jury with the equipment, and ultimately lose their interest in the subject—the actual case at hand.¹⁷⁰

160. Stephen G. Norten, *The Electronic Courtroom Revolution: The Right Stuff*, 26 VT. B. J. & L. DIG. 47, 48 (March 2000).

161. *Id.* at 47.

162. *Id.*

163. *Id.* at 48.

164. *Id.*

165. Norten, *supra* note 160.

166. *Id.*

167. Donald F. Parsons, Jr. & Lisa K.W. Crossland, *Technological Tools for Civil Litigation*, 14 DEL. LAW. 33, 38–39 (1996).

168. *Id.* at 39.

169. *Id.* at 37–38.

170. *See id.* at 38.

The Technology Survey reports that most attorneys do not use litigation support software,¹⁷¹ and only a few attorneys use trial presentation software.¹⁷² However, many attorneys stated they would be likely to purchase litigation support software if their opponent was using it,¹⁷³ or if their firm had a policy or recommendation regarding use.¹⁷⁴

Approximately 72% of lawyers surveyed have had no training in courtroom technologies.¹⁷⁵ Therefore most attorneys are unaware of the technology available to them.¹⁷⁶ For those attorneys who reported using technology, the most readily available device used was the laptop with presentation software.¹⁷⁷ Lawyers rarely use more advanced litigation tools, especially those tools available for annotation or evidence presentation, like color video printers, light pens, and touch screens.¹⁷⁸

The Model Rules do not need to address ethical concerns in relation to technological use in the courtroom, mainly due to the judge's ability to control its use. Nonetheless, razzle-dazzle technology can carry potential ethical issues. High tech courtroom equipment may help attorneys create misleading arguments by misrepresenting evidence. For example, a lawyer may recreate an accident using technology with overly dramatic overtones and graphics, thus distorting the relevant evidence. Even highlighted transcripts through multimedia presentation may tend to mislead by overemphasizing some testimony while distorting others. Of course, these tactics would most likely be corrected through effective cross examination. If so outrageous, it would likely be stopped before ever reaching the courtroom floor by a judge.¹⁷⁹ In any event, as more attorneys become familiar with courtroom technology, future changes to the Model Rules may be required to tackle the ethical concerns relating to courtroom presentation of evidence.

171. LITIGATION & COURTROOM, *supra* note 2, at 63 (finding 89.59% of attorneys surveyed did not use litigation support software).

172. *Id.* at 71 (4.46%).

173. *Id.* at 162 (38.1%).

174. *Id.* (56.5%).

175. *Id.* at 163 (71.88%).

176. LITIGATION & COURTROOM, *supra* note 2, at xiii.

177. *Id.*

178. *Id.*

179. See FED. R. EVID. 403 (stating that it would likely disallow the demonstrative evidence if the probative value of the evidence was substantially outweighed by the danger of misleading the jury).

VII. CONCLUSION

Based on the *Model Rules of Professional Conduct* and the results of the 2002 *ABA Technological Survey*, a technologically proficient and ethically sound lawyer should follow these guidelines:

1. A lawyer should have a website. While the website does not need bells and whistles, which can be expensive and high maintenance, it should provide adequate information to attract clients. It also should provide an easy method of contact. If you want to have an online free consultation, make sure you display prominent disclaimers about forming an attorney-client relationship. Joining or participating in listservs may also be a method of attracting clients, and e-mail is a good advertising method as long as it is properly designated as such. Be aware of real-time electronic contact, as those chat rooms may be construed as solicitation.

2. E-mail is an effective and efficient way for attorneys to communicate with clients. When e-mailing confidential information, it is best to highlight on your e-mail that the communication is confidential. Also, make your client fully aware of its confidentiality. For highly sensitive information, some form of encryption may be necessary. Also, check and double check the e-mail address of the receiver. If an e-mail is misdirected, its confidentiality may be lost.

3. Lawyers should connect to fee based legal research services like Westlaw and Lexis. CD-ROM's are an inexpensive and efficient method for specialized or state research topics. The day may be coming where clients will not pay bills for book research that may have been accomplished less expensively through online research.

4. Lawyers should begin to file court documents electronically where available. Courts will begin to prefer this method of filing, and learning the system while it is still optional will reduce the panic when it becomes mandatory. It also expedites litigation, a goal of the ethical rules.

5. A lawyer going to the courthouse to try a case should have a laptop and some basic litigation support software programs installed on it. Through software, a lawyer will be able to review documents, court files, and notes efficiently. Also with a laptop, a lawyer can use PowerPoint®, an inexpensive, but effective way of presenting evidence. The days of easels and handwritten diagrams are beginning to wane. Although there are many companies that will aid lawyers in presenting evidence with the dramatic flair of a Hollywood production, be wary of creating an overly dramatic effect. This result may be an actual misrepresentation of the evidence, along with an unimpressed and annoyed judge.

The goal of incorporating state-of-the-art technology into all facets of an attorney's practice may be commendable, but, given ethical concerns, it

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may be impractical. Despite this proviso, most lawyers are successfully incorporating many variants of helpful and time saving technology into their law practices. If these lawyers are careful to keep their technology practices keep in line with governing ethical requirements, they can begin to take advantage of the numerous technological advances in the practice of law.

UNIFORM TRANSFERS TO MINORS ACT ACCOUNTS—PROGRESS, POTENTIAL, AND PITFALLS

JANI MAURER*

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I. INTRODUCTION

A frequently employed technique for those parents, grandparents, and others desiring to make completed, irrevocable transfers to minors, without engaging in complicated transactions or incurring legal fees, is to transfer wealth to a Uniform Transfers to Minors Act (“UTMA”) account. This article discusses the general provisions of the Florida UTMA, noting why such accounts may be attractive to clients. Of equal importance, this article explores several pitfalls of which the creator of a UTMA account may not be aware. Clients may create UTMA accounts without advice, assistance of counsel, or other knowledgeable professional advisors. This presents a unique challenge to attorneys to raise the subject of UTMA accounts, and to provide at least general information to enable a client to determine if a UTMA account is an appropriate vehicle to accomplish the client’s aims; and if it is, how it should be established and administered properly.

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Use of such accounts has become increasingly popular since changes to applicable law in 1985.¹ These changes expanded the uses of UTMA accounts, and the types of property which could be owned in a custodianship for a minor.² As general market conditions and investments increased in value, so did the balances in UTMA accounts. In light of the enhanced wealth, which may now be found in these accounts, the rules applicable to administration and restrictions on these accounts warrant a review. The popularity of UTMA accounts nationwide has also resulted in increased litigation involving them. Both the creator of a UTMA account and the custodian should be aware of the possibility of litigation before the account is created.

While UTMA accounts serve valuable purposes and may be appropriate in some instances, if a creator of a UTMA account is fully informed about the account and the pitfalls mentioned in this article prior to its creation, three advantageous consequences might result. First, certain actions and precautions suggested in this article might be taken by the creator, decreasing the possibility of future problems, unintended results, and the need for future legal action. Second, some persons contemplating creation of UTMA accounts may select a different vehicle as more appropriate to accomplish their aims. Third, where a UTMA account is created, the informed custodian may be in a better position to avoid certain hazards.

II. GENERAL BACKGROUND

UTMA accounts are opened to accomplish a variety of purposes. Lifetime gifts to minors are often driven by the donor's desire to minimize income, gift, estate, and generation-skipping transfer taxes, as well as, motives to benefit the donee. The donor may seek to shift income from the donor in the higher tax bracket to the minor, who may be in a lower tax bracket and taxed at a lower income tax rate. The donor frequently also desires to eliminate the asset from donor's probate and taxable estates, and to part with the asset on a gift-tax-free basis.

The simplest form of gift is a direct outright gift of the property to the minor. However, the outright gift vests full title in the minor on completion of the gift. One drawback to an outright gift is the immediate and permanent loss of donor's control over the gifted property. Furthermore, state laws treat minors as legally incompetent persons, thus requiring guardianships or trusts

1. Florida Uniform Transfers to Minors Act, Ch. 1985-95, 1985 Fla. Laws 599 (codified as amended at FLA. STAT. §§ 710.101 - .126 (2003)).

2. Compare *id.*, with FLA. STAT. § 710.11 (2003).

to be created for the property until the minor reaches the age of majority. Institution of a court guardianship proceeding or creation of an express trust entails legal fees and costs a client may be attempting to avoid. One way to transfer legal ownership of property from a grantor to a minor and yet allow the grantor or another adult selected by the grantor to retain control of the property, and to keep the control temporarily out of the hands of the minor for a period of time, is through a custodianship under the UTMA.

Florida adopted its version of the UTMA in 1985.³ Every American jurisdiction has adopted a version of the UTMA.⁴ “The Uniform Transfers To Minors Act was approved by the National Conference of Commissioners on Uniform State Laws in 1983.”⁵ The UTMA revises and restates its predecessor, the Uniform Gifts To Minors Act (“UGMA”).⁶

UGMA was developed as a simple and inexpensive alternative to establishing a guardianship or trust for making lifetime gifts of property to a minor.⁷ UGMA was originally proposed by the National Conference of Commissioners on Uniform State Laws in 1956.⁸ The Conference revised UGMA in 1965 and 1966 “to expand the types of financial institutions which could serve as depositories of custodial funds, to facilitate the designation of successor custodians, and to add life insurance policies and annuity contracts to the types of property ([formerly limited to] cash and securities) that could be made the subject of a gift under the” UGMA.⁹

Uniformity in the area of gifts to minors is important because the person making the gift, the custodian, and the minor, who benefits from the gift, may all reside in different states, and may change their residences after the gift is completed.¹⁰ The original UGMA was “designed to avoid conflicts of law when the laws of more than one state might apply to a transaction or a series of transactions.”¹¹ However, many states substantially revised their versions of UGMA “to expand the kinds of property that may [b]e made the

3. See § 710.101.

4. *Prefatory Notes* to UNIF. TRANSFERS TO MINORS ACT, 8C U.L.A. 3 (1983).

5. *Historical Notes* to UNIF. TRANSFERS TO MINORS ACT, 8C U.L.A. 3 (1983).

6. *Id.*

7. Thomas E. Allison, *The Florida Uniform Transfers to Minor Act—A Viable Alternative*, FLA. B.J., Dec. 1986, at 49. In *Estate of Cardulla v. Commissioner*, the court stated in respect to New York UGMA accounts that “[t]he Uniform Gifts to Minors Act was enacted in New York to provide an alternative for people who wished to make gifts to their young progeny without placing the gifted property directly into the hands of the unwitting minor.” 51 T.C.M (CCH) 1511, 1520 (1986).

8. Thomas E. Allison, *The Uniform Transfers to Minors Act—New and Improved, But Shortcomings Still Exist*, 10 U. ARK. LITTLE ROCK L. REV. 339 (1987-88).

9. *Prefatory Notes* to 8C U.L.A. 3.

10. See *id.*

11. *Id.*

subject of a gift under [UGMA].”¹² As a result, non-uniformity arose among the states.¹³ As discussed later in this article, the result is that problems may arise when UTMA accounts opened in one state are moved to another state.¹⁴

UTMA restates and rearranges the UGMA of 1966.¹⁵ It was hoped that UTMA would improve clarity, uniformity among the state jurisdictions, and expand the types of assets covered.¹⁶ UTMA “follows the . . . approach taken by several states and allows [many types] of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodian for the benefit of a minor.”¹⁷ Additionally, it permits transfers by trusts, estates, and guardianships to UTMA accounts, not just gifts from individuals; “whether or not [such transfers are] specifically authorized in the governing instrument.”¹⁸ Once assets are transferred to a UTMA account from a trust, they are thereafter governed by UTMA statutes and not by the terms of the trust from which they were derived.¹⁹ Transfers from “[a] third part[y] indebted to a minor who does not have a conservator, such as [a] part[y] against whom a minor has a tort claim or judgment, and depository institutions holding deposits or insurance companies issuing policies payable . . . to a minor,” may also be made to a UTMA account.²⁰ Even with these changes, many states have made further revisions when adopting UTMA to govern transfers to minors in their jurisdictions; Florida is one such state. The Florida UTMA²¹ applies to transfers of property to minors²² through custodians.²³ Under the UTMA the custodianship generally terminates when the minor

12. *Id.*

13. *Id.*

14. *Prefatory Notes to UNIF. TRANSFERS TO MINORS ACT*, 8C U.L.A. 3 (1983).

15. *Id.* at 4.

16. *See Prefatory Notes to 8C U.L.A.* 3.

17. *Id.*; *see also UNIF. TRANSFERS TO MINORS ACT* § 1(6), 8C U.L.A. 14 (1983).

18. *Prefatory Notes to 8C U.L.A.* 3. Because of these enlargements, the name of the act was changed from “Gifts” to “Transfers.” *Id.*

19. *See In re Merrill*, 246 B.R. 906, 913 (Bankr. N.D. Okla. 2000).

20. *Id.* “[A] custodianship is not a separate legal entity or taxpayer.” *Prefatory Notes to 8C U.L.A.* 3. The custodianship does not file a federal tax return or pay taxes. *See id.* “[T]he custodial property is indefeasibly vested in the minor, not the custodian, and thus any income received is attributable to and reportable by the minor, whether or not actually distributed to the minor” *Prefatory Notes to UNIF. TRANSFERS TO MINORS ACT*, 8C U.L.A. 3 (1983); § 11(b), 8C U.L.A. 73.

21. FLA. STAT. §§ 710.101-.126 (2003).

22. “‘Minor’ means an individual who has not attained the age of 21 years.” § 710.102(11).

23. A “custodian” is defined as “a person so designated under § 710.111 or a successor or substitute custodian designated under § 710.121.” § 710.102(7).

reaches the age of twenty-one regardless of Florida's majority age of eighteen.²⁴

The balance of this article examines the benefits of UTMA accounts and hazards to guard against in selection, creation, and administration of the accounts. As relatively few Florida reported court decisions exist, cases from other jurisdiction with similar statutes are frequently cited.

III. IRREVOCABLE TRANSFER

To create a Florida UTMA account there must be a transfer from a donor to a custodian for a minor, and that the transfer be irrevocable.²⁵ Whether or not the custodian of the account is the transferor, the custodian must be informed that the custodianship assets may not be returned to the transferor, nor may the transferor thereafter direct how the UTMA assets are to be invested or expended.²⁶ This is true even if, due to an unanticipated change in circumstances, the transferor develops a dire need for the assets, or if the transferor did not understand that a UTMA account was being created and the restrictions on such an account.²⁷ If the grantor is also the custodian, and after the transfer to a UTMA account the transferor improperly uses the account assets as his own, for his personal benefit or retitling them in his own name, adverse consequences may result.²⁸ The grantor/custodian may be liable to the beneficiary for breach of fiduciary duties,²⁹ and may be sub-

24. § 710.123(1); UNIF. TRANSFERS TO MINORS ACT § 20(1), 8C U.L.A. 73 (1983).

25. §§ 710.113(2), .108(1). Other jurisdictions have also recognized that a transfer of property made to a custodianship account irrevocably vests legal title in the minor beneficiary. See *Roman v. Commissioner*, 73 T.C.M. (CCH) 2375 (1997) (referencing New Mexico UGMA); *Gordon v. Gordon*, 419 N.Y.S.2d 684, 688 (App. Div. 1979).

26. Cf. § 710.113(3).

27. See *Florida Bar v. Rose*, 607 So. 2d 394 (Fla. 1992). In *Rose* a husband and wife, who were both attorneys, were divorced. *Id.* Stock was owned in the name of the wife as custodian for the parties' minor children, under the Florida UGMA. *Id.* Years after the divorce, the father directed the sale of the stock. *Id.* The broker with whom the account was maintained sold the shares and issued checks to the former wife as custodian. *Id.* However, the checks were physically secured by the former husband. *Rose*, 607 So. 2d at 394. The former husband endorsed the checks with the wife's name and used the proceeds for his own personal purposes. *Id.* at 394-95. In disciplinary proceedings before the Florida Bar, the father contended he thought the trust created was revocable, or that a Totten Trust was created. *Id.* at 394. Not only was the father disciplined by the Florida Bar, but the brokerage firm replaced all funds misappropriated by the husband. *Id.* at 395. The claim of the creator of the account that he did not understand the restriction on the account did not alter the outcome. *Id.*

28. See *Gray v. United States*, 738 F. Supp. 453, 456 (N.D. Ala. 1990).

29. See *infra* Part VII.

ject to tax on income and gains earned on the assets.³⁰ The actions of a grantor/custodian in dealing with assets for his personal benefit may justify a court in concluding that the grantor lacked donative intent, and the UTMA account was not validly created.³¹

After the transfer to a UTMA account, the use of the assets is limited. Hence, the custodian, even if he or she is the transferor, may not use the account assets for unlimited purposes, even if the purposes directly or indirectly benefit the designated minor beneficiary.

The transferor may not, after creation of a UTMA account, alter the designation of beneficiary or change the time at which the beneficiary receives the assets in the account.³² For example, if the transferor created a UTMA account for grandchild A, and grandchild B is thereafter born, grandchild B may not be named a beneficiary of grandchild A's UTMA account. Statute mandates that there be only one beneficiary of each UTMA account.³³ Nor may the transferor direct on creation of a UTMA account for A that on the birth of B, A's UTMA account be divided into two separate accounts to benefit A and B equally. Similarly, if the transferor created and funded a UTMA account for A as an *inter vivos* gift, when A is twenty-one-years-old, A must receive the assets remaining in the account,³⁴ notwithstanding that A is a spendthrift, using illegal substances, or the existence of other reasons which would cause the transferor to prefer postponement of delivery of account assets to the beneficiary. The flexibility available in a trust to address such issues is lacking with UTMA assets.

The Florida Statutes provide substantial direction about the mechanics of creating a custodianship.³⁵ Stocks are transferred to a custodianship by titling the security in the name of the custodian as custodian for a named minor beneficiary under the Florida UTMA.³⁶ Similarly, monies may be delivered to a financial institution to open an account in the name of the custo-

30. *Gray*, 738 F. Supp. at 458.

31. *Dubisky v. United States*, 62 F.3d 182, 185 (7th Cir. 1995); *In re Jacobs*, 180 Cal. Rptr. 234, 242 (Ct. App. 1982); *see also* *State v. Keith*, 610 N.E.2d 1017, 1018 (Ohio Ct. App. 1991) (finding that the UGMA assets should be forfeited pursuant to *Ohio RICO Statutes*). In *Keith*, a mother opened an UGMA account for her daughter, thereafter continued to spend the funds as if they were the mother's sole property, and after her arrest for prostitution agreed to forfeiture of the account. *Id.* The child's father failed to prove donative intent or a legal source of the funds. *Id.* at 1019.

32. *See* §§ 710.112, .113(2).

33. § 710.112.

34. § 710.123(1).

35. *See* § 710.111.

36. § 710.111(1)(a).

dian, as custodian for the named beneficiary under the Florida UTMA.³⁷ Life insurance, an annuity, real estate, tangible personal property, and other assets susceptible to custodianship ownership may be similarly titled.³⁸ The proper titling of an asset in a UTMA account gives rise to a rebuttable presumption of donative intent.³⁹ The argument that this presumption is conclusive has been rejected.⁴⁰ Extrinsic evidence of fraud, mistake or other facts to establish that the grantor did not intend to create a UTMA account, despite the titling of the account or asset, is admissible to rebut the presumption.⁴¹ The signed documents creating the UTMA account at a financial institution may constitute prima facie evidence of donative intent.⁴² Failure to maintain adequate records reflects lack of donative intent.⁴³

Questions may arise about whether certain assets are capable of being transferred to a custodianship. *Florida Statutes* define custodial property generically, as “any interest in property transferred to a custodian under [the] act and the income from and proceeds of that interest in property.”⁴⁴ Section 710.111 of the *Florida Statutes*, in providing instructions for the mechanics of titling property in a custodianship, refers to securities, money, life insurance policies, endowment policies, annuity contracts, irrevocable powers of appointment, rights to payments under contract and interests in real property as all qualifying as custodianship property.⁴⁵ What constitutes a security is not defined.⁴⁶ Although no Florida appellate court has ruled on this question,

37. § 710.111(1)(b).

38. § 710.111.

39. *Golden v. Golden*, 500 So. 2d 260, 261 (Fla. 3d Dist. Ct. App. 1986). “An allegation and showing that the funds were expended for the named child’s education, maintenance or rehabilitation may rebut the presumption.” *Id.* In *Golden*, a father created a UTMA account in Florida for his son, and claimed that he spent the monies for rehabilitation, education and maintenance for his son. *Id.*; see *Dubisky v. United States*, 62 F.3d 182, 185 (7th Cir. 1995); see also *Gordon v. Gordon*, 419 N.Y.S.2d 684, 688 (App. Div. 1979).

40. *Golden v. Golden*, 434 So. 2d 978 (Fla. 3d Dist. Ct. App. 1983); *Gordon*, 419 N.Y.S.2d at 688.

41. *Golden*, 434 So. 2d at 978. In this case the court found the testimony of the grantor alone insufficient to rebut the presumption. *Id.* at 979. Where a transferor disputes the contention that he intended to make an irrevocable transfer to a custodianship account, this argument must be raised at trial or it is waived. See *Tritter v. Corry*, No. 95-1406, 1995 WL 648252, at *1 (1st Cir. Nov. 6, 1995).

42. *Heath v. Heath*, 493 N.E.2d 97, 100 (Ill. App. Ct. 1986). There the court stated that the party disputing the existence of donative intent has the burden of overcoming “the presumption of donative intent by clear, convincing, unequivocal, and unmistakable evidence”. *Id.* at 101.

43. *Dubisky*, 1994 WL 861127, at *1.

44. § 710.102(6).

45. § 710.111(1)(a)(2), (1)(b)-(e).

46. See § 710.102.

other jurisdictions have held that a promissory note from grantor payable to the custodian is not a security, and the signing by grantor of a promissory note in favor of the custodian, where no consideration is received by grantor in exchange, is not a valid transfer to a custodianship.⁴⁷ Other jurisdictions have recognized partnership interests as assets capable of custodianship ownership.⁴⁸

Where the transfer of funds or other assets is properly and directly accomplished by the donor to a custodian, and the assets are immediately titled in custodianship name, there may be little reason to question either the donor's intent or whether the applicable statutes were complied with when creating the UTMA account.⁴⁹ However, where a transfer is made by a donor to another, and thereafter a UTMA account is opened by the recipient of the asset, or where the account is improperly titled, or where other irregularities exist and the statute has not been strictly complied with, questions may arise concerning the donor's intent to make an irrevocable gift to the minor.⁵⁰ The failure to sufficiently comply with the statutory formalities may prevent creation of a UTMA account.⁵¹ Donative intent must exist at the time the transfer of assets to the custodian occurs.⁵²

47. *Crosby v. Commissioner*, 36 T.C.M. (CCH) 1401, 1403 (1977). Taxpayers opened savings accounts in their names as custodians for their minor children under California UGMA. *Id.* at 1402. They then signed promissory notes payable to themselves as custodians. *Id.* The taxpayers received no monies or other consideration in exchange for the promissory notes. *Id.* Grantors paid interest due on the promissory notes to the UGMA accounts, and claimed deductions for the interest expenses. *Id.* The applicable California UGMA defined security to include any note, other than one of which donor was the issuer. *Crosby*, 36 T.C.M. (CCH) at 1403 n.3. California law also provided that a gift of donor's promissory note, without consideration, did not create a legally enforceable obligation to repay under California law. *Id.* at 1403. Hence, the court concluded that the purported transfers of promissory notes to UGMA accounts were of no effect, there was no legally enforceable obligation by grantors to pay interest, and grantors could not deduct interest paid under I.R.C. § 163. *Id.*; see also *Karlin v. Commissioner*, 54 T.C.M. (CCH) 1381, 1383 (1987) (involving Kansas UGMA statutes); *In re Jacobs*, 180 Cal. Rptr. 234, 242 (Ct. App. 1982) (involving California UGMA statutes).

48. *Garcia v. Commissioner*, 48 T.C.M. (CCH) 425, 437 (1984).

49. See *Marshall v. United States*, 831 F. Supp. 988, 1002 (E.D.N.Y. 1993).

50. See *id.*

51. *Id.* In *Marshall*, a grandmother transferred funds annually for the benefit of her grandchildren. *Id.* at 992. The checks delivered by grandmother to her daughter (the minor beneficiary's parent) were mostly payable to the grandchild, and did not indicate on their face a custodianship arrangement. See *id.* at 993. Some, but not all, of the checks were deposited by the daughter in custodianship accounts for her children. *Marshall*, 831 F. Supp. at 993-95. The court made an independent finding based on the grandmother's testimony that, since she transferred the funds solely to benefit her grandchildren and did not expect to ever receive the funds back, she had the donative intent required to make an irrevocable transfer under UGMA. *Id.* at 1002. The court recognized that, although the formalities of the New York

Where the transfer by a donor is not made directly to a custodian for the minor, questions may arise concerning whether there was effective delivery of the gift to the donee.⁵³ Failure to literally comply with all statutory requirements does not necessarily compel a court to decide that delivery failed or that a UTMA account was not created.⁵⁴

There must be a bona fide transfer of an asset to create a UTMA relationship.⁵⁵ Where a donor owned 100% of the stock in a closely held corporation, issued stock certificates purporting to transfer half of the shares to his wife as custodian for their two sons, thereafter retained full control of opera-

UGMA were not literally complied with, as checks were delivered to donor's daughter payable to the grandchildren, to the extent the daughter deposited them in UGMA accounts there was sufficient compliance with the statute. *Id.* But see *Thompson v. Sundholm*, 726 F. Supp. 147, 150 (S.D. Tex. 1989) (stating that the donor failed to create a UGMA account when he endorsed a cashiers check with the notation that it was to be deposited into the account of two named minors.); § 710.111. The Texas statute, like the Florida statute, required certain language to be used to create a custodianship. *Thompson*, 726 F. Supp. at 150. Both states precluded a gift to two minors in one custodianship. *Id.*; see also § 710.112. As the donor in *Thompson* failed to adhere to the statutory language, there was no gift to the minor, and no effective transfer under UGMA occurred. *Thompson*, 726 F. Supp. at 150.

52. *Marshall v. United States*, 831 F. Supp. 988, 1002 (E.D.N.Y. 1993); *Gordon v. Gordon*, 419 N.Y.S. 2d 684, 688 (App. Div. 1979).

53. See *Marshall*, 831 F. Supp. at 1002; *Driscoll v. Commissioner*, 31 T.C.M. (CCH) 418 (1972) (example of how a grantor may fail to effectively make a transfer to a custodianship). In *Driscoll*, the grantor was a married father of nine minor children, all residing in California. 31 T.C.M. (CCH) at 419. The taxpayer initially conducted a business as a sole proprietorship. *Id.* He then signed a partnership agreement, purporting to cause his children to own fifty-percent of the business, and to have a fifty percent interest in capital and profits. *Id.* The taxpayer's wife signed the partnership agreement as trustee for the minor children, and a document appended to the partnership agreement stated that the taxpayer transferred a security interest in the business to his wife as custodian under the UGMA for the minor children. *Id.* at 420. The following year, bank accounts were opened in the name of the taxpayer and his wife as trustees for each child. *Id.* A year later, new bank accounts were opened in the name of the taxpayer's wife as custodian under the UGMA. *Driscoll*, 31 T.C.M. (CCH) at 420. In the following year, court proceedings were instituted to have taxpayer's wife appointed guardian of each minor child. *Id.* When faced with these facts, the court held that intent by a grantor to make a gift in a custodianship was missing, and no valid custodianship was established. *Id.* at 422.

54. *Marshall*, 831 F. Supp. at 1002. "The case law is clear that the protection of UGMA will extend to gift giving even when the precise requirements of the statute are not followed." *Id.* However, when accounts are titled in the names of donors "as trustees" for the minor, and evidence reflects that the transfers were revocable by donors, the court will not deem the transfers to be irrevocable transfers under the UGMA. *Heintz v. Commissioner*, 41 T.C.M. (CCH) 429, 430-31 (1980).

55. See generally *Duarte v. Commissioner*, 44 T.C. 193 (1965). Where a donor signed a document reflecting an intent to make gifts in the future of stock proceeds, but never actually transferred the stock or the proceeds to the custodianship account, no gift occurred. *Sussman v. Sussman*, 402 N.Y.S.2d 421, 423 (App. Div. 1978).

tions of the corporation, made an S election, never delivered the certificates or any income earned to the custodian, and no custodianship accounts were opened, no bona fide transfer had occurred.⁵⁶ The facts that the donor filed income tax returns for the minors, reported their share of the S corporation income, and paid the tax owed by the minors did not change the court's conclusion.⁵⁷ Creation and transfer to a custodianship account cannot be used to defraud creditors.⁵⁸

Although the UTMA statutes typically refer to intentional transfers made by a grantor, UTMA accounts may arise as a result of other laws. For example, lottery statutes may specify that lottery winnings are to be paid to a custodian for a minor who wins the lottery.⁵⁹

The irrevocability of the transfer, combined with the restrictions on and inflexibility of UTMA accounts, may lead transferors to conclude that other vehicles would be more responsive to their needs. This is particularly true if the UTMA account is expected to own considerable wealth when distribution to the beneficiary is required.

IV. MANDATORY DISTRIBUTION

As alluded to above, section 710 of the *Florida Statutes* requires mandatory distribution to the beneficiary of a UTMA account.⁶⁰ When the distribution of all remaining account assets is required depends upon how the account was initially created. Perhaps the most common occurrence is the creation of a UTMA account by *inter vivos* gift from the transferor pursuant

56. See *Duarte*, 44 T.C. at 193.

57. *Id.* at 195-96. But see *Kirkpatrick v. Commissioner*, 36 T.C.M. (CCH) 1122 (1977) (stating the Tax Court recognized the validity of transfers of closely held stock from both parents to one parent as custodian for their minor children). Many factors influenced the court to recognize the validity of the transfers, even though corporate profits were not distributed to the minors. *Id.* at 1126. First, shares were actually titled in custodianship name. *Id.* at 1123. Second, the custodian played an active role in the business, safeguarding the minors' investments. *Id.* at 1126. Third, when corporate funds were spent to purchase assets for the corporation and expand the business, the custodian was involved in the decision making. *Id.* Fourth, when sums were borrowed by the grantor-shareholder, there was adequate interest and security provided. *Kirkpatrick*, 36 T.C.M. (C.C.H.) at 1128. The borrower even took a bank loan personally, to enable him to pay interest to the custodianship accounts. *Id.* at 1124.

58. See *Dubisky v. United States*, 62 F.3d 182, 184 (7th Cir. 1995). The taxpayer created UGMA accounts while he was being investigated by the I.R.S., at a time when the taxpayer had reason to believe he had engaged in illegal tax shelters. *Id.* These transfers did not create valid custodianship accounts. *Id.*

59. N.Y. STATE LOTTERY FOR EDUC. LAW § 9553(b) (McKinney 2003); N.Y. TAX LAW § 1613(b) (McKinney 2003); *Anastasio v. Commissioner*, 67 T.C. 814 (1977).

60. § 710.123.

to section 710.105 of the *Florida Statutes*. In that instance, distribution of remaining account assets to the beneficiary is required on the beneficiary's twenty-first birthday.⁶¹ The same result follows if the account was created as a consequence of a gift to a minor made in a decedent's last will and testament, or a gift emanating from a trust which directs delivery to a custodian.⁶²

While the above may reflect the more common means of creating a UTMA account, such accounts may arise in other circumstances. Where a will or trust agreement makes a gift to a minor but does not designate a custodian to receive the gift for the minor, or if a gift arises to a minor in intestacy, the personal representative or trustee may nevertheless deliver the gift to a custodian of a UTMA account, if certain requirements are met.⁶³ A conservator may likewise have power to create a UTMA account for a minor.⁶⁴ In these less prevalent circumstances, mandatory distribution of the UTMA account occurs when the minor attains age eighteen.⁶⁵

Clients appreciative of the possibility of changes in circumstances may not wish to guarantee that distributions will occur at the ages set by statute. The beneficiary may not be sufficiently mature to manage the assets, or may be a spendthrift, or may suffer from other vices or disabilities causing distribution to be unwise. At the least, if clients are informed of the mandatory distribution requirements of the statutes, they may limit the funding of the UTMA accounts.

61. § 710.123(1). In *Borbonus v. Commissioner*, 42 T.C. 983, 992 (1964), the Tax Court recognized the pervasive uniformity of this requirement in the vast majority of states.

62. §§ 710.106-.123(1).

63. § 710.107(1). Section 710.107(3) allows such a transfer only if:

- (a) The personal representative, trustee or conservator considers the transfer to be in the best interest of the minor;
- (b) The transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and
- (c) The transfer is authorized by the court if it exceeds \$10,000 in value.

§ 710.107(3). Furthermore, sections 744.301(2) and (4) limit the ability of the parents of a minor, as natural guardians, to take certain actions on behalf of the minor child when the amount involved exceeds \$15,000.00, absent court authorization or approval. This restriction applies where the minor has a claim for damages to person or property or for wrongful death, which is proposed to be settled. § 744.301(2).

64. § 710.107(2). A conservator includes "a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions." § 710.102(4).

65. § 710.123(2). Were this not the case an inequity could result. Absent this rule, where a UTMA account was created in circumstances that could otherwise warrant guardianship, distribution to the minor would be delayed to age twenty-one, whereas if guardianship option had been selected or continued, distribution would occur at age eighteen. *Cf. id.*

Mandatory distribution of UTMA accounts also occurs on the death of the minor prior to the minor attaining the age set forth in the statute.⁶⁶ The possible consequences of this requirement are discussed below.

V. PREMATURE DEATH OF MINOR

Section 710.123(3) of the *Florida Statutes* requires that the assets remaining in a UTMA account be distributed to the minor's estate immediately upon the minor's death occurring before he or she attains the age otherwise applicable for distribution.⁶⁷ While this provision may not deter transferors from creating UTMA accounts, two principal consequences flowing from this statute are worthy of consideration by the transferor prior to creation of the account.

The first consequence is that the statute is likely to cause a need for a probate of the minor's estate. While various short forms of probate may be available if the account is not substantial in value and the minor does not own significant other assets, the need for any court probate proceeding nevertheless depletes remaining account assets.⁶⁸ There is neither a mechanism in the applicable statutes to provide for an alternative beneficiary in the event of the minor's untimely demise, nor to avoid the need for court probate proceedings on the minor's death, as would be possible in a trust.

The second consequence which may be viewed as adverse by the transferor involves who becomes entitled to the account assets in the event of the minor's death. Assuming that the UTMA account was created under section 710.105 by *inter vivos* gift, or section 710.106 by will or trust agreement, and the account beneficiary dies after attaining age eighteen, it is possible that the beneficiary will die testate, stating in his or her will who receives the UTMA account assets.⁶⁹ However, in the majority of cases this is unlikely to occur. Hence, the beneficiary's estate is more likely to be distributed through intestacy. It may thus be in-laws of the transferor, former in-laws of the transferor, or others whom the transferor does not wish to benefit who receive part or all of the remaining UTMA account assets.⁷⁰

66. § 710.123(3).

67. *Id.*

68. § 735.201(2) (permitting summary administration to occur when the decedent's entire estate subject to probate is worth no more than \$75,000.00).

69. Even in this situation, the transferor has little control over who the UTMA account beneficiary names as beneficiary under his or her Last Will and Testament. It is suggested that beneficiaries of UTMA accounts over age eighteen be encouraged to execute Wills, thus exercising control over who receives account assets in the event of their untimely demise.

70. See generally §§ 732.102-.103. To illustrate, assume that grandpa created and funded a UTMA account, with *inter vivos* gifts, for the benefit of his granddaughter. Grandpa's son

It is suggested that the transferor be informed of these potential consequences, however remote or infrequent, before the creation of a UTMA account or funding it with substantial assets.

VI. EXPENDITURES FROM UTMA ACCOUNTS

While the *Florida Statutes* are detailed in their coverage of the mechanics and logistics governing creation of a UTMA account, no similar thorough guidance is provided with respect to the custodian's obligations. One of the most important obligations of a custodian is to expend account principal and income appropriately.⁷¹ The custodian may only spend for the benefit of the minor.⁷²

Directions afforded the custodian are principally generic. The custodian is given "all the rights, powers, duties, and authority provided in this act."⁷³ The custodian is directed to "observe the standard of care that would be observed by a prudent person dealing with property of another."⁷⁴ Although the custodian is given "all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property,"⁷⁵ this clearly does not include unrestricted spending power.

The primary direction to the custodian about proper spending is set forth in section 710.116 of the *Florida Statutes*.⁷⁶ It purports to allow the custodian discretion to spend, without court order, "so much of the custodial property as the custodian considers advisable for the use and benefit of the minor."⁷⁷ In determining what sums are to be expended, the custodian need not be mindful of the minor's other assets or income, or the obligation or ability of any person to support the minor.⁷⁸ Finally, the *Florida Statutes*

served as custodian and wisely invested the account assets. When granddaughter is age sixteen and the UTMA account is worth \$150,000.00, granddaughter dies. Her death occurs one year after the dissolution of her parents' marriage. Under Florida intestacy law, each parent of the deceased beneficiary receives \$75,000.00. See § 732.103(2). Grandpa may not be pleased with this outcome.

71. See § 710.114.

72. See generally *id.*

73. § 710.113(2).

74. See § 710.114(2) (discussing investments).

75. § 710.115(1).

76. § 710.116.

77. See generally § 710.116(1).

78. *Id.*; see also *Weiss v. Weiss*, No. 91CIV.5115(KMW)(MHD), 1996 WL 91641, at *1 (S.D.N.Y. Mar. 4, 1996) (discussing whether, under New Jersey statutes, a custodian should use custodianship assets to pay bills which are normally a parental obligation of support).

authorize the expenditure of UTMA account assets to pay the custodian's reasonable expenses and compensation.⁷⁹

What constitutes spending for the minor's benefit is not clearly defined. Courts recognize that the custodian may use account assets for the minor's maintenance, education, and benefit, decide to spend or refuse to spend account assets, and even terminate the account by spending all assets for or distributing them to the minor beneficiary.⁸⁰ Once the beneficiary is an adult, the beneficiary may sue the custodian if the beneficiary contends expenditures were improper.⁸¹

In other jurisdictions, where one parent of the minor beneficiary was the custodian of an account, and funds from the account were loaned to the beneficiary's other parent for use in his business, the court held that this loan was for the benefit of the minor.⁸² However, where the custodian loaned funds from a UGMA account to her friend, without obtaining a signed promissory note, security agreement or other proper documentation; without setting due dates for repayment or an interest rate; and without keeping proper records of the loan or its repayment, or assuring that it was repaid, the loan was not for the benefit of the minor.⁸³ "Loans from a custodia[n] to an individual outside the family are subject to a high degree of scrutiny."⁸⁴ Use by a custodian, who is grantor of the account and the parent of the minor beneficiary, to pay

79. § 710.117.

80. *Exch. Bank & Trust Co. of Fla. v. United States*, 694 F.2d 1261, 1263 (D.C. Cir. 1982).

81. *See Weiss*, 1996 WL 91641, at *1. This case presents an example of a situation in which a son, who was the beneficiary of a UGMA account, sued his father who was both donor and custodian. *Id.* The father created and funded UGMA accounts, intending to use the assets for his son's education and related expenses. *Id.* at *3. The father actually used his own monies to pay these charges, and reimbursed himself from UGMA assets. *Id.* at *3-5. On attaining the age of majority, the son claimed that the reimbursement was improper and the father, as custodian, should have distributed all remaining UGMA assets to the son. *Id.* at *5-6.

82. *See, e.g., Marshall v. United States*, 831 F. Supp. 988, 1005 (E.D.N.Y. 1993). In this case the custodian was the mother of the minor beneficiaries, and custodianship assets were received from the custodian's mother. *Id.* at 992. The custodian loaned funds from the UGMA account to her husband, the father of the minor beneficiaries, for use in his law practice. *Id.* at 995. The loans were made without proper documentation, and without setting due dates or interest rates. *Id.* Despite these facts, since the borrower had a legal and moral obligation to repay the loans and to support his minor children, the court held that it was in the best interests of the children that he be provided with needed funds for his business. *Id.* at 1005.

83. *Marshall*, 831 F. Supp. at 1005-06.

84. *Id.* at 1005.

the custodian's legal fees to litigate custody or visitation issues, is not proper spending for a minor from a UTMA account.⁸⁵

In addition to the potential liability of the custodian to the minor for breach of fiduciary duties if the custodian improperly expends UTMA account assets,⁸⁶ other adverse consequences may flow from the custodian's wrongful expenditure.⁸⁷ To the extent that a custodian uses or expends assets owned by a UTMA account for purposes other than for the benefit of the minor, the assets may lose their protection from claims of the custodian's creditors.⁸⁸ This is true even if the custodian was not the donor of the UTMA account.⁸⁹

Any interested person may request a court to order the custodian to spend additional sums for the minor, and the UTMA account beneficiary may personally seek such a court order after the beneficiary is fourteen-years-old.⁹⁰ Due to the need for the custodian to expend sums properly from the account, and the custodian's potential liability for improper spending, the lack of direction in the statutes about what constitutes proper spending is particularly distressing. This lack of direction has been recognized by at least one Florida court.⁹¹ The vague standard set forth in the statutes leaves the custodian exposed to potential liability.

85. *Tritter v. Corry*, No. 95-1406, 1995 WL 648252, at *2 (1st Cir. Nov. 6, 1995).

86. See *Marshall*, 831 F. Supp. at 1006. In that case the court found that the custodian of a UGMA account created by the custodian's mother for the custodian's minor children violated her fiduciary duties by failing to account for all monies contributed by donor and by failing to place them beyond the reach of the custodian's creditors. *Id.* The lack of proper records from the custodian to establish that all sums received from donor were properly deposited in custodianship accounts and expended for the benefit of the minor beneficiary constituted a breach. *Id.* The custodian in that case could not prove where certain monies given to her were deposited and where other monies were spent. *Marshall v. United States*, 831 F. Supp. 988, 1005 (E.D.N.Y. 1993); see discussion *infra* Part VII (discussing breach of fiduciary duties by the custodian).

87. *Marshall*, 831 F. Supp. at 1002. In *Marshall*, both the inability of the custodian to explain how certain contributed funds were spent and the custodian's improper expenditure of funds for purposes other than the benefit of the minor caused those amounts to be available for seizure by the custodian's creditor. *Id.* at 1006.

88. *Dubisky v. United States*, No. 93C 4505, 1994 WL 861127, at *1 (N.D. Ill. Sept. 13, 1994); *Marshall*, 831 F. Supp. at 1002.

89. *Marshall*, 831 F. Supp. at 988.

90. § 710.116(1)-(2). This section uses the term interested person, but fails to define it. See generally *id.* One might conclude in light of analogous probate law, that this term includes any person who could be impacted by the outcome of the proceeding. See § 731.201(21).

91. See *Irvin v. Seals*, 676 So. 2d 436 (Fla. 2d Dist. Ct. App. 1996). That case involved a paternity suit, in which the father of the child admitted paternity. *Id.* at 437. The child's mother was a full time student, and the father was a professional football player earning a substantial income of over \$800,000.00 annually. *Id.* The court ordered the father to pay

A related concern is when and whether the custodian should distribute property in a UTMA account to the minor beneficiary prior to the time mandated by statute.⁹² The *Florida Statutes* allow the custodian to do so whenever the custodian considers distribution advisable for the use and benefit of the minor beneficiary.⁹³ Courts have opined that, as a custodianship account has only one beneficiary, it is unlikely that a custodian would be restrained from distributing all custodianship property early.⁹⁴ This may lead a grantor to question what assurance he really has that the assets will be preserved and protected for the minor before the beneficiary attains the age of majority.

VII. SELECTION OF CUSTODIAN AND SUCCESSOR

The applicable statute requires a custodian to be named for a UTMA account to be created.⁹⁵ The custodian named may be the transferor or another qualified person.⁹⁶ Care should be exercised in selecting the initial custodian and alternates. The custodian has legal obligations and needs to carefully guard the account against the wrongdoing of others.⁹⁷ Unanticipated complications may arise if the transferor is the custodian or if the initial custodian nominated becomes unable to serve.

A transferor creating a UTMA account will frequently desire to be the custodian and to retain control over investments in the account, perhaps for lack of other trustworthy persons to nominate, in an effort to regulate spend-

child support. *Id.* However, as the court found that only part of the sum paid monthly would be needed for the current support of the child, the excess was directed to be deposited in a UTMA account. *Id.* Judge Parker expressed discomfort with the absence of statutory guidance about, among other things, how the account would be administered, expended, and distributed. *Irvin*, 676 So. 2d at 437.

92. See § 710.116(1).

93. *Id.*

94. *Stuit v. Commissioner*, 54 T.C. 580, 583 (1970).

95. § 710.104.

96. §§ 710.104, .111(1)(a)(1). Any adult or trust company may be the designated custodian when the creator of the account names the custodian. § 710.111(1)(a)(1).

97. Others, including the creator of the account, may improperly attempt to secure control of assets in the account. In *Snow v. Byron*, a husband created a UTMA account for his wife's son born of a prior marriage and named his wife as custodian. 580 So. 2d 238, 239 (Fla. 1st Dist. Ct. App. 1991). After dissolution of their marriage, the former husband tried to get UTMA assets. *Id.* To accomplish this, the husband closed the account by forging his former wife's signature. *Id.* After the wrongdoing was discovered, and the wrongdoer-former husband had used all funds from the UTMA account for his own personal purposes, the custodian sued the brokerage firm in which the account was invested for breach of contract. *Id.* at 239-40. Since the opening of a UTMA account entails a contract between the financial institution and the custodian, an action for breach of contract may arise when the financial institution allows someone other than the custodian to withdraw sums from the account. *Id.* at 240.

ing from the account or due to other motivations.⁹⁸ Although ownership of the account assets is by law vested in the minor beneficiary once the account is created and funded, the account may, as a practical matter, remain subject to seizure by the transferor's creditors if the transferor is also the custodian.⁹⁹ In one case where a transferor created a UTMA account in Florida for her daughter and the transferor was the custodian, the UTMA account was thereafter seized by the Internal Revenue Service to pay deficiencies in the transferor's income taxes.¹⁰⁰ The transferee was deemed to be merely a nominee for the transferor-custodian.¹⁰¹ The possibility of such an outcome resulting may be diminished (although not eliminated) if the transferor providing the funding for the account is not the custodian.¹⁰² Furthermore, adverse estate tax consequences may follow to the donor's estate if the transferor is the custodian.¹⁰³

Adverse consequences may result from the failure to account for future circumstances and from the transferor's failure to select a sufficient number of alternate custodians.¹⁰⁴ The *Florida Statutes* expressly allow the transferor to name not only an initial custodian, but also alternates to serve if the initial custodian becomes unable or unwilling to serve.¹⁰⁵ Florida law only allows one custodian to serve at a time.¹⁰⁶ While there is admittedly no guaranty that any one of multiple successor custodians will remain willing and able to

98. See e.g. *Marshall v. United States*, 831 F. Supp. 988 (E.D.N.Y. 1993) (finding that the custodian misappropriated some of the funds).

99. See *Ryiz v. First Bankers, N.A.*, 516 So. 2d 1069 (Fla. 4th Dist. Ct. App. 1987); see also *Dubinsky v. United States*, No. 93C 4505, 1994 WL 861127, at *1 (N.D. Ill. Sept. 13, 1994).

100. *Ryiz*, 516 So. 2d at 1069–70. The I.R.S. levied on the UTMA account. *Id.* Normally, a defense to such a levy could have been that the bank was not in possession of funds belonging to the taxpayer-custodian, as she was not the account owner. *Id.* at 1071. The minor beneficiary was the owner of the account. *Id.* at 1070. However, in this case the I.R.S. levy served named the child as nominee for the parent-custodian-taxpayer. *Id.*

101. *Ryiz*, 516 So. 2d at 1070.

102. See *Marshall*, 831 F. Supp. at 988. In that case a grandmother gave cash to her grandchildren which was deposited in UGMA accounts. *Id.* at 993. The mother of the minor grandchildren was the custodian. *Marshall v. United States*, 831 F. Supp. 988, 997 (E.D.N.Y. 1993). The custodian and her spouse owed substantial income taxes. *Id.* at 996. The income tax liability arose after the grandmother made some gifts, but before she made other. *Id.* at 993. The court held the I.R.S. was entitled to levy on a portion of the UGMA account assets. *Id.* at 1003.

103. See discussion *infra* Part XII (discussing tax consequences); see also *Exch. Bank & Trust Co. of Fla. v. United States*, 694 F. 2d 1261, 1265 (D.C. Cir. 1982).

104. See § 710.104(1) (providing for substitute custodians in the event the first named custodian dies before the transfer, among other circumstances).

105. *Id.*

106. § 710.112.

serve in the future, designation of alternates at the outset is wise. If the one or more persons named as the custodian or substitute custodian die or cease serving as custodian of a UTMA account, prior to the time set for distribution of assets to the beneficiary, and no successor custodian was named, the statutes allow replacement of the custodian without court action in only limited circumstances.¹⁰⁷

Where the transferor is alive or in existence (in the case of transfers from estates or trusts), if all persons designated custodian become unwilling or unable to serve, or continue to serve in this capacity, the transferor may designate a substitute custodian,¹⁰⁸ and no disruption to the account should occur. If the transferor is deceased, or the transferor entity no longer exists, this is not an option.¹⁰⁹ Court action may then be required to designate a successor custodian.¹¹⁰

If the initial custodian named declines to serve at the time of creation of the UTMA account, statute provides that the transferor or the transferor's legal representative may designate a new custodian.¹¹¹ The term "legal representative" for this purpose is narrow, and includes only the transferor's personal representative or conservator.¹¹² Since this provision allowing a personal representative to act applies only on creation of the account, it applies solely to UTMA accounts created in wills. If a transferor attempts to create an *inter vivos* UTMA account and thereafter becomes incompetent or dies, and the initially named custodian declines to serve and there are no willing alternates, no other person is authorized to name a substitute custodian to cause the account to be effectively established.

Statute also allows one who is serving as custodian to name his or her own successor; provided that the transferor may not be named in this fashion.¹¹³ Where the transferor neglected to name alternate custodians, the acting custodian should consider promptly doing so to avoid the problems discussed below which result when no successor is named. This is true even if the acting custodian does not intend to immediately resign, as the designation of substitute may be effective on the death, resignation or incapacity of the acting custodian.¹¹⁴

107. § 710.121(4).

108. § 710.121(1).

109. *Id.*

110. *Id.*

111. *Id.*

112. § 710.102(9).

113. § 710.121(2).

114. *Id.*

If there is no custodian serving at any time, due to death, disability, removal, or resignation of the custodian, and no successor nominated by the transferor or the acting custodian is available, or if the transferor and the last serving custodian are deceased or incompetent and hence unable to appoint a successor custodian, whether court action will be required depends, in part, on the age and actions of the minor beneficiary.¹¹⁵ If the beneficiary is at least fourteen years old, the beneficiary may name a successor custodian.¹¹⁶ The successor custodian must be an adult member of the minor's family, a conservator, or a trust company.¹¹⁷ This is a much more limited group of eligible custodians compared to the options initially available to the creator of the UTMA account. The minor has up to sixty days after a vacancy exists in the office of custodian to act.¹¹⁸

Should the minor beneficiary fail to timely name a new custodian as described above, or if the minor is not fourteen and hence is ineligible to do so, court appointment of a custodian is needed.¹¹⁹ If there is already a conservator in place for the minor, that conservator becomes the custodian of the UTMA account.¹²⁰

Court action to seek appointment of a successor custodian may be instituted by any interested person, the transferor,¹²¹ the transferor's legal representative, the custodian's legal representative, or an adult member of the minor's family.¹²² Where court action is needed to replace a custodian, a separate action must be instituted for each separate UTMA account created by a transferor for a different beneficiary.¹²³ In light of the potential need for court action to appoint a custodian and the costs of such court action, care

115. § 710.121(4).

116. *Id.*

117. *Id.*

118. *Id.*

119. § 710.121(4)-(6).

120. § 710.121(4).

121. *Id.* Although the transferor has the right to institute suit for appointment of a custodian, it is difficult to understand why such action would be warranted. Section 710.104(1) of the *Florida Statutes* allows the transferor to name successive custodians. Unless this statute is interpreted to afford transferor this right only on inception or creation of the UTMA account, since the statute says that the designation is revocable, the transferor should have a continuing right and should not have to resort to court action to nominate a successor when no custodian is serving. See § 710.104(1).

122. § 710.121(4), (6).

123. See § 710.112. If there are several different UTMA accounts for one beneficiary at different financial institutions held by one custodian, only one court proceeding should be needed. *Id.* Section 710.112 of the *Florida Statutes* provides that "[a]ll custodial property held under this act by the same custodian for the benefit of the same minor constitutes a single custodianship." *Id.*

should be exercised to assure that alternates are named at all times, and the likelihood of court action is diminished.

The investments contributed to the UTMA account initially, and the investments the UTMA account is expected to own in the future, may impact who is an appropriate custodian. For example, a custodian, who is a director of a publicly traded company, has certain disclosure and reporting requirements to satisfy if he owns stock in a company of which he is a director in a UTMA account.¹²⁴

It is also wise to select a solvent, fiscally responsible, diligent person, who is adept at proper record keeping as the initial custodian. The same characteristics should be sought in a successor custodian. If not, harm may occur to the UTMA account if the custodian is indebted and his creditors seek to recover from the UTMA account.¹²⁵ Other problems can arise if proper records and documentation are not maintained to establish that the account was properly created, that assets were at all times properly titled in the custodianship, and that investments and expenditures were in accordance with the statute. The need for proper record keeping for all custodianship transactions should be emphasized.

VIII. LIABILITY OF CUSTODIAN

The two major ways in which a custodian of a UTMA account is subject to liability include: 1) failure to properly spend account assets; and 2) failure to properly title, account for, protect, preserve, and invest account assets.¹²⁶ As noted previously, a custodian is not given adequate instruction in the statutes in respect to expending funds from the UTMA account.¹²⁷ Custodians are given discretion with respect to management and investment of UTMA account assets.¹²⁸

The custodian must invest as a reasonable prudent person.¹²⁹ The custodian is not generally held to the same standards with respect to investments

124. SEC v. Golconda Mining Co., 291 F. Supp. 125, 127 (S.D.N.Y. 1968). That case involved a director of three publicly traded corporations who traded in stock of those corporations through Idaho UGMA accounts he created for his minor children, and of which he served as custodian. *Id.* Because the beneficiaries of the UGMA accounts were the custodian's immediate family members, he was required to report the purchases and sales. *Id.* Legal action ensued against him when he neglected to report these and other stock transactions. *Id.* at 125.

125. See discussion *infra* Part VIII.

126. § 710.114.

127. See discussion *infra* Part VI.

128. § 710.114.

129. *Id.*

as a trustee.¹³⁰ Whether the custodian invests prudently is a separate issue from whether the custodian acts for the benefit of the minor.¹³¹ Unlike other fiduciaries, the custodian may merely retain assets contributed to the account by the transferor.¹³² Hence, the custodian does not appear to have the same obligation as a trustee or other fiduciary to diversify investments. Where the custodian has special expertise, such skill must be used for the benefit of the minor.¹³³ The UTMA account must be segregated from all other property owned or held, individually or in a fiduciary capacity, by the custodian.¹³⁴ The custodian must maintain adequate records of all account assets and transactions.¹³⁵

The custodian is subjected to liability, both to third parties and the minor. In the event of suit, UTMA account assets may be at risk, and the custodian may be personally liable.¹³⁶ The first potential liability considered is to third parties other than the minor beneficiary.¹³⁷ Where liability to a third party arises under a contract entered by the custodian in relation to the custodianship, such as an obligation arising from the ownership of custodial property or a tort committed by the minor or the custodian during the course of the custodianship, the third party may recover judgment out of the custodianship assets.¹³⁸ In addition, recovery may be available against the custodian and/or the minor personally.¹³⁹

Generally, assets in the custodianship account cannot be reached to pay personal debts of the custodian.¹⁴⁰ Where an attempt is made by a creditor of

130. See *Buder v. Sartore*, 774 P.2d 1383, 1388 (Colo. 1989). The court analyzed the standard of care applicable to a custodian of a Colorado UTMA account, and held that the custodian was liable for damages resulting from breach of fiduciary duties when he invested about half of the monies in penny stocks and lost considerable sums. *Id.* at 1390. Damages awarded included decline in value of investments, lost income, and attorneys' fees. *Id.*

131. *Marshall v. United States*, 831 F. Supp. 988, 1003 (E.D.N.Y. 1993). Two separate inquiries may be needed when the custodian's action is questioned. *Id.* The first inquiry questions whether the investment was for the benefit of the minor. *Id.* The second inquiry is whether the investment was prudent. *Id.* Where an investment might be prudent but not be for the benefit of the minor, the converse is not true. *Id.*

132. § 710.114(2).

133. *Id.*

134. § 710.114(4).

135. § 710.114(5).

136. See § 710.119(1)(a)-(c).

137. *Id.*

138. § 710.119(1)(a).

139. § 710.119(1)(c).

140. See *Friedman v. Mayeroff*, 592 N.Y.S.2d 909, 912 (Civ. Ct. 1992). In that case a parent served as custodian of bank accounts for her minor children. *Id.* at 910. After the accounts were created, the parents of the minor children were sued in a landlord-tenant action, and a judgment was entered against them. *Id.* The court held that the judgment creditor could

the custodian to collect a debt from UTMA assets, the custodian must be careful to promptly take correct legal steps if seizure of the UTMA assets is to be avoided. In one case a grantor created a UTMA account for the benefit of her minor daughter.¹⁴¹ Grantor named herself the custodian of the account.¹⁴² The Internal Revenue Service ("I.R.S.") determined that the grantor/custodian personally owed delinquent taxes, and levied on the UTMA account.¹⁴³ The financial institution in which the account was invested honored the levy, despite the custodian's objection.¹⁴⁴ When the custodian sued the financial institution in state court for wrongfully honoring the levy, the action was dismissed.¹⁴⁵ The appellate court based its conclusion on the custodian's failure to follow proper procedures to prevent enforcement of the levy, which required the custodian to institute suit against the government.¹⁴⁶ The Broward County Circuit Court lacked jurisdiction over the dispute.¹⁴⁷ The custodian's failure to take proper legal action in a timely manner resulted in the loss of the UTMA assets.¹⁴⁸

At times custodianship assets may be subject to seizure by the creditor of a custodian, where the underlying liability owed by the custodian personally to the creditor had nothing to do with the UTMA account, and where the custodian was not the donor of the account.¹⁴⁹ Where a custodian's creditor attempts to reach assets in a UTMA account to satisfy the custodian's personal debt, the court faces a dilemma.¹⁵⁰ While the court does not wish to deprive the innocent minor of funds, it also does not wish to afford debtors an opportunity to deal with assets as if the debtor personally owned them, yet allow the debtor to shield the assets from the debtor's creditors.¹⁵¹

not recover sums due from the custodial accounts, as the minor, rather than the custodian, was the true owner of the account assets. *Id.* at 912.

141. *Ryiz v. First Bankers, N.A.*, 516 So. 2d 1069, 1070 (Fla. 4th Dist. Ct. App. 1987).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Ryiz*, 916 So. 2d at 1071.

147. *Id.*

148. *See id.* at 1070–71; *see also* *Marshall v. United States*, 831 F. Supp. 988, 997–1001 (E.D.N.Y. 1993) (explaining the proper procedure to be followed by the custodian when the I.R.S. levies a UTMA account assets is to collect a tax liability of someone other than the beneficiary of the account).

149. *See Marshall*, 831 F. Supp. at 1003.

150. *Id.*

151. *Id.* In *Marshall*, the court recognized this dilemma stating:

If a court condones a delinquent taxpayer's or debtor's use of UGMA custodial funds then the court creates a means by which a delinquent taxpayer or debtor can improperly shield assets from the I.R.S. or a creditor and at the same time permit the delinquent taxpayer or debtor to use those funds as if he/she owned them. On the other hand, if the court fails to honor the

Where a custodian's creditor attempts to reach the funds to satisfy the custodian's personal debt, the court may look at various factors as persuasive.¹⁵² These include: whether the donor is also the custodian of the account or if the donor is not the custodian then whether the custodian is a family member of donor; whether the donor or the custodian owes the debt for which collection is sought;¹⁵³ whether the custodian converted funds in the account for his or her personal use;¹⁵⁴ and other "family circumstances."¹⁵⁵ Even where the custodian is the debtor, and the separate donor is not indebted to the creditor, a creditor of the custodian may be permitted to seize custodianship assets because the custodian wrongly previously converted them to the custodian's own personal use.¹⁵⁶ Once the conversion occurs, the funds are no longer being held for the benefit of the minor.¹⁵⁷

Similarly, where a UTMA account is initially established to defraud donor's creditors and to prevent them from recovering debts owed by the custodian/donor, the assets in the custodianship account will not be protected by the custodian's creditors.¹⁵⁸

There are also situations in which the creation and existence of UTMA accounts may cause them to be involved in or a subject of litigation, necessitating defensive action by the custodian, although no one is yet attempting to seize the accounts themselves. In various litigations and contexts an issue may be raised about whether the custodian holds the assets in the account

UGMA arrangement it will deprive the minor of property intended as a gift under the Uniform Gifts to Minors Act.

Id.

152. *Id.*

153. *Marshall*, 831 F. Supp. at 1003. The court favored limiting the creditor's ability to collect when the custodian is the debtor, but was not the donor, and neither the donor nor the minor beneficiary were indebted. *Id.* In contrast, creditors would be afforded more generous rights where the donor and the custodian are the same person, and it is this individual who is indebted. *Id.*

154. *Id.* at 1003-04.

155. *Id.* at 1003.

156. *Marshall*, 831 F. Supp. at 1003-04.

157. *Id.* By converting the funds to the custodian's own personal use, they are placed beyond the reach of the minor. *Id.* at 1004. A rebuttable presumption may arise that such action was taken to preclude creditors from collecting. *Id.* The custodian is entitled to rebut the presumption, by establishing that the action was inadvertent or negligent, and perhaps preclude the creditor reaching the funds. *Id.*

158. *Friedman v. Mayeroff*, 592 N.Y.S.2d 909, 912 (Civ. Ct. 1992); *see also* *Hall v. United States*, 71 A.F.T.R.2d 93-360 (N.D. Ga. 1992). In *Hall*, a father owed payroll taxes. *Id.* To avoid collection by the I.R.S., he transferred funds to his wife as custodian for their minor child. *Id.* at 93-362. The I.R.S. was successful in levying on the custodianship accounts. *Id.* at 93-364; *see also* *Dubisky v. United States*, No. 93C 4505, 1994 WL 861127, at *1 (N.D. Ill. Sept. 13, 1994).

solely in a fiduciary capacity, or whether the custodian personally has rights to account assets.¹⁵⁹

The second potential liability of the custodian is to the minor for a breach of fiduciary duties.¹⁶⁰ One duty of the custodian is to protect the UTMA assets.¹⁶¹ The increased variety of assets which may be titled in UTMA fashion increases the risks and need for vigilance. If others wrongly obtain custodianship assets, the custodian has a duty to attempt to recover those assets from the wrongdoer or a third party.¹⁶² Custodians who received or made proper investments have needed to institute law suits to protect UTMA assets in complicated transactions resulting in litigations.¹⁶³ The fact

159. See *Estate of Cardulla v. Commissioner*, 51 T.C.M. (CCH) 1511 (1986) (involving a dispute about whether decedent and his wife owed income taxes). One issue concerned whether numerous UGMA accounts the taxpayers created for their minor grandchildren, of which one taxpayer served as custodian, were assets owned by the taxpayers for purposes of determining their net worth. *Id.* at 1515. As the UGMA accounts were opened in compliance with the New York UGMA, the court held that these were not personal assets of the custodians and not included in their net worth. *Id.* at 1521.

160. See *Snow v. Byron*, 580 So. 2d 238, 240 (Fla. 1st Dist. Ct. App. 1991).

161. See generally *id.*

162. *Id.* at 238. The custodian's spouse had created and funded a UTMA account for the custodian's son. *Id.* at 239. The parties separated and before their marriage was dissolved, the creator of the account forged the custodian's signature to recover the account assets for himself. *Id.* When the custodian discovered the wrongdoing, she sued the brokerage firm in which the UTMA account was invested for breach of contract, and sued the bank in which the wrongdoing grantor deposited the account proceeds by forging the custodian's endorsement. *Snow*, 580 So. 2d at 240. Financial institutions are not liable for the improper titling of assets in a custodianship name or for the improper withdrawal and expenditure by the custodian. *Id.* at 243. In *Gale v. Harbor Federal Savings & Loan*, 571 So. 2d 114, 115 (Fla. 4th Dist. Ct. App. 1990), a guardian titled assets owned by a minor in a custodianship account rather than a guardianship. The guardian was the minor beneficiary's mother. *Id.* When it was discovered that the guardian dissipated the UGMA account for her personal benefit, she was removed as guardian. *Id.* The successor guardian unsuccessfully sued the financial institution in which the UGMA account had been maintained, in an effort to recover the monies lost. *Id.* Because the court had not ordered a restricted account in the guardianship, the financial institution was not liable for the mother's breach of fiduciary duties. *Id.*

163. See *Simon v. New Haven Bd. & Carton Co.*, 393 F. Supp. 139 (D. Conn. 1974). In that case, the plaintiff was a custodian of stock under the New York UGMA. *Id.* When the corporation whose stock the custodian held became involved in a questionable merger with several Florida corporations, the custodian instituted a stockholder's derivative suit. *Id.* at 140.; see also *Kahn v. Chase Manhattan Bank*, 760 F. Supp. 369 (S.D.N.Y. 1991) (custodians instituted an action for RICO violations against a brokerage firm, its employees and counsel arising from allegedly fraudulent securities transactions); *Rabinowitz v. Cont'l-Wirt Elecs. Corp.*, No. 86-1537, 1987 WL 14687, at *1 (E.D. Pa. Nov. 13, 1987) (involving disputes about a stockholders agreement where some shares in the closely held corporation were held in an UGMA account); *Goldstein v. Rusco Indus., Inc.*, 351 F. Supp. 1314 (E.D.N.Y. 1972) (mother commenced an action as custodian of her son's UGMA account for alleged federal securities laws violations by a company whose stock was owned in the UGMA account).

that stock, or other assets, involved in the lawsuits is owned by a UTMA account frequently has no legal impact on the lawsuit. The point is that by virtue of asset ownership, the custodian may become involved in litigation.¹⁶⁴ Cases exist nationwide in which custodians are instituting or otherwise becoming parties to suits in connection with the purchase or ownership of securities in UTMA accounts or the actions of the publicly traded companies whose stock is owned by UTMA accounts.¹⁶⁵ Institution of, or participation in these lawsuits by the custodian may be necessary for the custodian to avoid liability to the beneficiary for breach of fiduciary duties.¹⁶⁶ The custodian may be made a defendant in such a lawsuit.¹⁶⁷

One issue which may arise in such litigation is which court has jurisdiction, particularly where the custodian and the asset are located in one state, but the minor beneficiary resides in another state.¹⁶⁸ While in other contexts, courts frequently distinguish a custodianship from a trust, in deciding jurisdictional issues, the court may analogize a custodianship to a trust.¹⁶⁹ Where a custodian attempted to establish diversity jurisdiction in federal court based on the minor beneficiary's state of residence, the court determined that it was the custodian's residence which controlled.¹⁷⁰ For this purpose, the court

164. See generally *Snow v. Byron*, 580 So. 2d 238, 239–40 (Fla. 1st Dist. Ct. App. 1991).

165. See *Kyung Sup. Ahn M.C., P.C. v. Rooney, Pace Inc.*, 624 F. Supp. 368 (S.D.N.Y. 1985) (involving suit against an introducing broker for fraud, in which issues were raised about whether arbitration was compulsory); *A.P.N. Holdings Corp. v. Hart*, 615 F. Supp. 1465 (S.D.N.Y. 1985) (involving suit by purchasers of stock in an insurance company against sellers of the stock for breach of contract, breach of warranty, and other actions); *Johnson & Staley, Inc. v. Bushan & Levy, P.C.*, 527 F. Supp. 1159 (S.D.N.Y. 1981).

166. Knowledge of both the creator of a UTMA account and a custodian about the potential for lawsuits, may influence decisions about what is a proper asset to contribute to a UTMA account and whether investments should be made or retained in a UTMA account.

167. See *Johnson & Staley, Inc.*, 527 F. Supp. at 1159.

168. See *Von Ritter v. Columbia County Sheriff's Dept.*, No. 91-CV-612, 1992 WL 175535, at *1 (N.D.N.Y. July 21, 1992).

169. *Id.*

170. *Id.* at *2. A Connecticut UGMA account had been created, under statutes which provided that legal title to custodianship property was vested in the minor beneficiary. *Id.* at

*1. The court stated:

The fact that the beneficiary has indefeasibly vested legal title to the custodial property does not mean that his title is exclusive or absolute. . . . [T]he beneficiary is not entitled to have all of the custodial property released to him until he attains the age of 21. Certainly, therefore, the beneficiary's title is not absolute. What has been created here is a trust, albeit under a different name, and the creation of a trust entails the separation of legal and equitable title, and the vesting of legal title in the trustee (custodian).

Id. (citations omitted); see also *Thompson v. Sundholm*, 726 F. Supp. 147 (S.D. Tex. 1989). In that case, the plaintiff attempted unsuccessfully to establish diversity jurisdiction premised on alleged creation of Texas UGMA transfers. *Id.* at 149. The court held that the plaintiff's

viewed the custodian as similar to a trustee, and ruled it was the custodian's residence which was relevant to determining whether diversity jurisdiction existed.¹⁷¹

Custodians are, and should be, liable for their improper use of UTMA assets. Actions have been instituted against custodians for their failure to account for UTMA assets, improper transfer of UTMA assets into their names individually, and fraudulent transfer of UTMA assets into the names of persons other than the minor beneficiary of the account.¹⁷² A custodian is liable to the minor beneficiary for using funds in the custodianship account for personal living expenses of the custodian.¹⁷³ Such action gives rise to a debt owed by the custodian to the minor which is not dischargeable in bankruptcy.¹⁷⁴

actions in endorsing a check as payable to two named minors did not comply with Texas statutory requirements to create a UGMA account. *Id.* at 150.

171. See generally *Von Ritter*, 1992 WL 175535, at *1.

172. See *Elliott v. Kiesewetter*, 98 F.3d 47 (3d Cir. 1996). In *Elliott*, prior to his death, a wealthy father placed his assets in the name of his son, an attorney with a masters in tax law. *Id.* at 51. Assets were owned by the son, individually and as custodian for his father's minor grandchildren. *Id.* The understanding was that the son would manage the father's wealth for the benefit of all family members. *Id.* The son thereafter misappropriated assets and transferred some of them into his wife's name. *Id.* at 50. Decedent's other children, for themselves and as natural guardians of their minor children, instituted actions for accounting, breach of fiduciary duties, fraud, unjust enrichment, and violations of the UGMA. *Elliott*, 98 F.3d at 50. The action was commenced against the son with respect to assets in UGMA accounts and other assets the son held in a fiduciary capacity. *Id.*

173. See *In re Johns*, 181 B.R. 965 (Bankr. D. Ariz. 1995). In this case, the father established UGMA accounts for his minor son, both before and after the father's divorce from the son's mother. *Id.* at 967. The father was the custodian of the accounts. *Id.* Thereafter, the father withdrew most of the funds in the accounts and spent them for his own benefit. *Id.* When the son sought to collect the monies and have the debt owed to him declared nondischargeable in the father's bankruptcy, the father unsuccessfully presented two arguments. *Id.* at 969-72. First, the father claimed that Arizona's repeal of UGMA and replacing it with UTMA somehow canceled UGMA accounts opened prior to the repeal. *Johns*, 181 B.R. at 972. Second, the father asserted that he only intended the UGMA accounts to be used for the son's college education, and the son's failure to attend college justified the father's use of account assets for himself. *Id.* at 969. The court rejected both arguments. *Id.* at 969-72.

174. *Id.* at 975; see also *In re Merrill*, 246 B.R. 906, 912 (Bankr. N.D. Okla. 2000) (involving a parent who established a UTMA account in Oklahoma for his minor child, and thereafter withdrew sums from the account to invest in an oil and gas venture in the father's name as trustee of another trust). Despite the fact that the funds allegedly initially came from this other trust, once they were placed in a UTMA account, an irrevocable transfer occurred which could not be changed. *Id.* at 913. The UTMA statutes, not any separate trust agreement, controlled the ownership, management, investment, and distribution of the funds thereafter. *Id.* The court further ruled that when a fiduciary, including a custodian of a UTMA account, breaches a duty imposed by law, the debt that thereby arises is a defalcation which is not dischargeable in bankruptcy. *Id.* at 922. A failure to account for funds in a UTMA ac-

However, where the custodian unwittingly makes unwise investments of UTMA account assets, the custodian may need to defend her decisions and even litigate to retain the benefits of them for the minor beneficiary. In one instance a donor created UGMA accounts in Colorado for her minor children.¹⁷⁵ She then invested the accounts in what was later disclosed to be an unlawful Ponzi scheme.¹⁷⁶ Before the discovery was made and before the entities operating the scheme went bankrupt, the custodian received a return well in excess of her investment.¹⁷⁷ Once the partnerships filed bankruptcy, the bankruptcy trustee unsuccessfully attempted to recover the profit from the custodian.¹⁷⁸

A custodian may be liable to the beneficiary for breaches of other duties.¹⁷⁹ Another duty of a custodian is to segregate the UTMA assets from other wealth owned by the custodian either personally or in another fiduciary capacity.¹⁸⁰ Fulfillment of this duty can be particularly important when the person serving as custodian owes debts unconnected with the custodianship or files personal bankruptcy.¹⁸¹ Others may also be penalized for wrongful conduct of a custodian with reference to a minor's funds.¹⁸²

count constitutes such a breach. *Id.*; see also *Merrill v. Merrill*, No. 00-5201, 2001 WL 909157, at *1 (10th Cir. Aug. 13, 2001). Actions of a custodian of an Oklahoma UTMA account were not dischargeable in bankruptcy as the actions constituted "fraud or defalcation while acting in a fiduciary capacity." *Merrill*, 246 B.R. at 919 (quoting 11 U.S.C. § 523(a)(4) (2003)); accord *Tritter v. Corry*, 69 F.3d 531 (1st Cir. 1995).

175. *In re Hedged-Invs. Assoc., Inc.*, 84 F.3d 1281 (10th Cir. 1996).

176. *Id.* at 1282.

177. *Id.*

178. *Id.* at 1283.

179. See generally *In re Dally*, 202 B.R. 724 (Bankr. N.D. Ill. 1996).

180. *Id.*

181. *Id.* *In re Dally*, a mother opened and funded UGMA accounts under Illinois law. *Id.* at 726. She also served as custodian of the accounts. *Id.* Thereafter, she personally took a bank loan from the bank at which the UGMA accounts were invested. *Dally*, 202 B.R. at 726. The UGMA accounts were pledged by the custodian as collateral for the bank loan, and the custodianship nature of the accounts was fully disclosed to the bank in the loan security documents. *Id.* When the loan was not paid, the bank obtained a judgment against the debtor, after which she filed personal bankruptcy. *Id.* The court held that the debtor claimed no personal interest in the UGMA accounts and that they were not part of the bankrupt's estate. *Id.* at 728. However, the court recognized that a controversy existed concerning whether the minor children or the bank-creditor had better right to the UGMA accounts, as they were pledged as collateral for the loan. *Id.* at 727. The court ruled that the Bankruptcy Court lacked jurisdiction over that issue. *Dally*, 202 B.R. at 728.

182. See *Warren v. SEC*, No. 94-9534, 1995 WL 640359, at *1 (10th Cir. Oct. 23, 1995) (involving a stock broker who was suspended and fined for failing to open custodianship accounts, when he knew the owners of the investment were minors, and knew his employer required opening UGMA accounts). Instead, he put false ages of the owners on the accounts,

IX. REMOVAL OF CUSTODIAN

While the *Florida Statutes* address removal of trustees¹⁸³ and provide grounds for removal of personal representatives,¹⁸⁴ no statute exists setting forth grounds for removal of a custodian. Section 710.121 of the *Florida Statutes* references removal of a custodian in its caption, and identifies who has standing to seek removal of a custodian.¹⁸⁵ What constitutes cause for removal is not specified by statute. Breach of the custodian's fiduciary duties should constitute ground for removal. Clients should be informed of the uncertainty in the law regarding the basis and procedures for seeking removal of a custodian.

X. RELOCATION OF UTMA ACCOUNTS

For a UTMA account to be initially created in Florida, the transferor, the minor, or the custodian must be a Florida resident.¹⁸⁶ If a UTMA account is initially created in another jurisdiction, the account may be moved to Florida.¹⁸⁷ If it was created under a similar law, its terms may be enforced in Florida.¹⁸⁸ If the account was initially established in another jurisdiction in which the statutes governing UTMA accounts differ from those in Florida, the account remains subject to the statutes under which it was initially created.¹⁸⁹ A practical problem which arises is whether the brokerage firms, banks, or other financial institutions in Florida to which the account is transferred, note the differences or adhere to the applicable foreign law. However, other issues exist. To illustrate, as the standard of care to which a custodian is held in investing assets may differ from one state to another, confu-

and allowed the parent of the minors to liquidate assets, withdraw sums from the accounts, and trade on margin, without the parent having legal authority to do so. *Id.*

183. §§ 737.201(1)(a), 737.205. Section 737.201(1)(a) of the *Florida Statutes* grants the circuit court jurisdiction in actions to remove a trustee, and section 737.205 of the *Florida Statutes* governs institution of such proceedings.

184. Sections 733.504 and 733.505 of the *Florida Statutes* grant the circuit court in the pending probate jurisdiction in the removal action, and section 733.506 governs institution of such proceedings. *Florida Probate Rule* 5.440 provides further procedures applicable to removal of a personal representative.

185. The creator of the UTMA account, his or her legal representative, an adult member of the minor beneficiary's family, the guardian or conservator of the minor beneficiary, or the minor beneficiary if he or she is over the age fourteen, may institute suit to remove and replace a custodian. § 710.121.

186. § 710.103(1); 28 FLA. JUR. 2D *Gifts* § 24 (1998).

187. § 710.103(3).

188. *Id.*

189. *Id.*

sion may occur if attention is not paid to the standard set by the state of the account's creation after the account is moved to a new state. In addition, some states preclude or limit spending from UTMA accounts to discharge a parental obligation of support when the minor beneficiary's parents have sufficient assets to meet these obligations, while other states do not. Care must be taken to assure that, if a UTMA account is relocated, the laws applicable in the state of its creation are still applied adhered to and to the account.

If a UTMA account is initially established in Florida, although the minor beneficiary and the custodian thereafter leave the state and move the account to another state, Florida law states the custodianship will survive.¹⁹⁰ When a UTMA account is relocated to another state, the custodian remains subject to personal jurisdiction in the state in which the account was created.¹⁹¹

XI. TERMINATION OF CUSTODIANSHIP

Just as questions may arise about whether a transfer under UTMA was intended and in fact occurred, issues may arise concerning whether the custodianship assets were distributed and the custodianship was terminated.¹⁹² *Florida Statutes* are silent about the procedures for terminating a UTMA account, the documents to be executed, and what constitutes termination. In another state, where a grandmother purchased stock and titled it in her name as custodian for her minor grandchildren; forwarded all original stock certificates she received to the grandchild's parent; endorsed and forwarded dividend checks to the grandchild's parent; and forwarded stock dividends to the grandchild's parent until shortly before the grantor's death when she was too ill to forward documents; the court held that the grantor manifested an intent to relinquish all of her rights as custodian during her life.¹⁹³

To avoid such complications and the litigation they generate, when a custodian resigns or intends to distribute custodianship assets, it is advisable for the assets to be promptly retitled and a clear written record created.

190. James R. Ledwith & Mary Ann Robinson, *Expanded Opportunities Available Under Uniform Transfers To Minors Act*, 13 EST. PLAN. 258, 260 (1986).

191. *Id.*

192. *Estate of Vogel v. Commissioner*, 36 T.C.M. (CCH) 875 (1977).

193. *Id.* at 876-77. That case involved Minnesota UGMA accounts for a minor beneficiary residing in Oklahoma. *Id.* at 876. The Minnesota UCC allowed a transfer by gift of a security to be completed on delivery without endorsement by the donor. *Id.*

XII. TAX CONCERNS

There are income tax, estate tax, and gift tax consequences to creation and ownership of UTMA accounts. The grantor of a UTMA account is frequently attempting to diminish his or her taxable estate by making annual tax free transfers for younger family members to UTMA accounts. Thus, the first concern becomes whether the transfers to the UTMA accounts are free of gift tax. A transfer of assets to a UTMA account is a completed gift for federal gift tax purposes.¹⁹⁴ If the transfers to a UTMA account in any given year per grantor do not exceed the \$10,000.00 limit, transfers may qualify for the annual gift tax exclusion under section 2503 of the *Internal Revenue Code*.¹⁹⁵ The value of the gift is the fair market value of the asset transferred to the UTMA account at the time of the transfer.¹⁹⁶ However, the fact that a transfer to a UTMA account is a completed gift for federal gift tax purposes does not mean that the UTMA account assets are excluded from the taxable estate of grantor.¹⁹⁷

The fact that a completed gift has occurred for federal tax purposes also does not mean that there are no income tax consequences flowing from the

194. Rev. Rul. 59-357, 1959-2 C.B. 212. A bona fide transfer with economic substance must have occurred for the creation of a custodianship arrangement to be recognized for federal income tax purposes. *Duarte v. Commissioner*, 44 T.C. 193, 197 (1965). In that case the taxpayer was the sole owner of all stock in a corporation. *Id.* at 193. He issued stock certificates reflecting that he transferred half of his stock to his spouse as custodian for his two minor sons. *Id.* at 194. Taxpayer filed a federal gift tax return reflecting the transfers, although no gift tax was due. *Id.* at 195. He then made an S election for the corporation, and otherwise continued to solely operate the corporation's business. *Id.* However, he reported one-fourth of the profits as income to each of his minor sons, despite the fact that no distributions were ever made. *Duarte*, 44 T.C. at 195. The court determined that the purported transfers lacked economic reality. *Id.* at 196. As such, donor owed income tax on all profits of the corporation. *Id.*; see also *Beirne v. Commissioner*, 52 T.C. 210, 220 (1969).

195. Rev. Rul. 59-357, 1959-C.B.212. If the value of assets transferred to the UTMA account results in the payment of gift tax, and the UTMA account is included in donor's taxable estate, section 2012 of the Internal Revenue Code may allow a credit for gift tax paid against federal estate tax owed by a donor's estate. Rev. Rul. 59-357, 1959-2 C.B. 212.

196. Rev. Rul. 56-86, 1956-1 C.B. 449.

197. See, e.g., *Ritter v. United States*, 297 F. Supp. 1259, 1262 n.1 (S.D. W. Va. 1968) (citing *Estate of Varian v. Commissioner*, 47 T.C. 34 (1966)). This case involved a grantor who created irrevocable *inter vivos* trusts for his minor children, of which he was the trustee, rather than UTMA accounts. *Id.* at 1260. However, grantor retained for himself trustee powers and discretions strikingly similar to those a custodian of a UTMA account would have. *Id.* at 1262.

transfer.¹⁹⁸ Once a UTMA account is created and funded, a change in the custodian is not a taxable event and does not result in a taxable gift.¹⁹⁹

The next concern is whether the UTMA account is included in the taxable estate of grantor or the custodian under sections 2036 or 2038 of the *Internal Revenue Code*. Section 2036(a)(2) of the *Internal Revenue Code* generally provides that a decedent's gross estate for federal estate tax purposes includes any assets transferred by decedent, other than transfers for full and adequate consideration, in which decedent retained the right to determine alone or with another, who shall possess or enjoy the property gifted or the income thereon.²⁰⁰ Similarly, under section 2038(a) of the *Internal Revenue Code*, a decedent's gross estate for federal estate tax purposes includes assets transferred during life by decedent, other than for full and adequate consideration, if decedent retained the right, alone or with another, "to alter, amend, revoke, or terminate" enjoyment of the asset.²⁰¹

If the custodian of the UTMA account is not the grantor or the spouse of the grantor of the account, then assets in the UTMA account are not generally included in either the grantor's or the custodian's taxable estate for federal estate tax purposes. If the grantor serves as custodian of the account, the balance in the account is included in grantor's gross estate for federal estate tax purposes.²⁰² The broad powers of a custodian to use and spend assets, as

198. Basis issues and assignment of income issues can arise with respect to gifts to UTMA accounts, just as they arise with other *inter vivos* gifts. To illustrate, in *Peterson Irrevocable Trust #2 v. Commissioner*, 51 T.C.M. (CCH) 1300 (1986), a taxpayer transferred stock in a corporation by whom he was employed to his wife as custodian for his minor children. *Id.* at 1301. The transfers were made immediately prior to the sale of the corporation's stock to a third party, and before the contract for that sale was signed. *Id.* at 1311-12. The court determined that at the time of the transfer the taxpayer had reason to know that the stock would shortly be sold. *Id.* at 1319. Hence, the taxpayer-transferor was responsible for reporting and paying income tax on the gain realized on the stock sale. *Id.* Similarly, where a father was custodian for his minor children and regularly traded their custodianship brokerage accounts, the father rather than the children had to report and pay income tax on gains where he transferred stock to his children after he knew a merger could occur. *Estate of Applestein v. Commissioner*, 80 T.C. 331, 342 (1983). The court stated that:

where the right to income has matured at the time of the transfer, the transferor will be taxed notwithstanding the technical transfer of the income-producing property. However, the mere anticipation or expectation of income at the time of the assignment is insufficient to give rise to a fixed right to earned income.

Id. at 345. The court did not alter its conclusion because the custodian sold the stock to the children at a bargain price as opposed to gifting it for no consideration. *Id.* at 346.

199. Rev. Rul. 59-357, 1959-2 C.B. 212.

200. I.R.C. § 2036(a)(2) (2000).

201. § 2038(a)(1).

202. §§ 2036(a)(1), 2038(a)(1). In Revenue Ruling 57-366, 1957-2 C.B. 618, the I.R.S. analogized the UTMA account to a trust, and stated:

well as invest and distribute, cause the account assets to be included in a custodian's estate when the custodian is the creator of the account.²⁰³ Where the grantor/custodian is the parent of the minor beneficiary, this conclusion has been based at times on the fact that UTMA account assets may be expended to satisfy the custodian's obligation to support the minor beneficiary.²⁰⁴ It is irrelevant that the parent who creates the account and serves as UTMA account custodian never uses account assets to discharge the parent's legal support obligation to the minor beneficiary. The mere power to use assets in this fashion results in inclusion of the entire account balance in the parent-

Where a donor transfers property to himself as trustee and retains the right as trustee to pay the income and the principal to a designated beneficiary or to withhold enjoyment of the property from the beneficiary until the beneficiary attains a certain age, the value of the transferred property is includible in the decedent-trustee's gross estate under section 2038(a)(1) of the Internal Revenue Code of 1954 as a transfer in respect of which he retained a power to alter, amend, revoke, or terminate. The fact that the beneficiary may have a vested interest in the property which would pass to his heirs in the event of his death before attaining the specified age is immaterial. The result is the same where a donor transfers property to himself as custodian pursuant to the provisions of the model custodian act and retains substantially the same powers. . . .

Id. (citations omitted). In Revenue Ruling 70-348, 1970-2 C.B. 193, the I.R.S. further ruled that even if powers to alter, amend, revoke or terminate enjoyment of custodianship property are not retained by the grantor/custodian at his death, the mere possession by grantor of the custodianship assets causes inclusion in his taxable estate. This rule applies even if the beneficiary of the account has been emancipated by marriage and is no longer a minor for state law purposes. *Eichstedt v. United States*, 354 F. Supp. 484, 487 (N.D. Cal. 1972); *see also* *Stuit v. Commissioner*, 54 T.C. 580, 582 (1970); *Estate of Jacoby v. Commissioner*, 29 T.C.M. (CCH) 737 (1970). In *Estate of Jacoby* a grandfather titled shares of stock in a closely held corporation in his name as custodian for his minor grandchild. *Id.* All dividends thereafter on the shares owned in custodianship were deposited in a bank account in the name of the grantor as custodian for the minor grandchild. *Id.* at 738. On the grantor's death, the Tax Court held that both the value of the stock and the UGMA bank account were included in grantor's taxable estate under section 2038 of the *Internal Revenue Code*. *Id.* at 740. Revenue Ruling 70-348, 1970-2 C.B. 193 likewise stated that where the donor of assets to a UGMA account was the successor custodian of the account for his minor children, his wife having been the initial custodian who resigned, the value of the account was included in the donor's estate at his death under section 2038 of the *Internal Revenue Code*.

203. *Exch. Bank & Trust Co. of Fla. v. United States*, 694 F.2d 1261, 1264 (Fed. Cir. 1982); *Estate of Carpousis v. Commissioner*, 33 T.C.M. (CCH) 1143, 1146 (1974).

204. *See* *Estate of Chrysler v. Commissioner*, 44 T.C. 55 (1965), *rev'd on other grounds*, 361 F.2d 508 (2d Cir. 1966); *Estate of Carpousis*, 33 T.C.M. (CCH) at 1143. Similarly, in *Estate of Prudowsky v. Commissioner*, a father opened UGMA accounts for his three minor children and titled securities in his name as custodian for his minor children. 55 T.C. 890, 892 (1971). On his death the court held that the custodianship assets were included in his federal taxable estate. *Id.* at 895. The court stated that "where one who has a legal obligation of support transfers property to himself as custodian under a Uniform Gifts to Minors Act . . . he thereby retains the power to apply said assets in satisfaction of his legal obligation" to support the minor beneficiary. *Id.* at 894. As such, section 2036(a) of the *Internal Revenue Code* mandates inclusion of custodianship assets in the custodian's taxable estate.

custodian's estate at the parent's death, when the parent was both grantor and custodian of the account.²⁰⁵ Where grantor is the custodian, inclusion of UTMA assets in grantor's estate may also be based on the custodian's power to terminate and distribute the assets.²⁰⁶

The same conclusion is reached that the UTMA account assets are included in the grantor/custodian's taxable estate where the grantor is not the beneficiary's parent and has no legal obligation to support the beneficiary.²⁰⁷ As the custodian of a UTMA account controls when principal and income are enjoyed by the beneficiary, on the custodian-grantor's death prior to full distribution of the UTMA account, the value of the account may be included in the custodian/grantor's taxable estate.²⁰⁸

To avoid inclusion in the grantor's estate of UTMA account assets, a parent might attempt to create UTMA accounts for her children, naming her spouse as custodian. If only one parent creates a UTMA account for the parties' minor child and names the other parent as custodian, the UTMA account may escape inclusion in the grantor's estate. However, where both parents of the minor simultaneously engage in similar transactions, each creating a UTMA account for the minor child, and each naming the other parent as custodian, the reciprocal trust doctrine precludes exclusion of the UTMA account assets from the deceased grantor's estate.²⁰⁹ Where such tactics were

205. See *Exch. Bank & Trust Co. of Fla.*, 694 F.2d at 1264; *Estate of Carpousis*, 33 T.C.M. (CCH) at 1143; Rev. Rul. 56-484, 1956-2 C.B. 23.

206. See *Estate of Prudowsky*, 55 T.C.M. (CCH) at 890, in which the grantor/custodian was the father of the minor beneficiaries of custodianship assets. Because he at all times retained the power under applicable state law to terminate and distribute assets to the minor beneficiaries, at his death the custodianship assets were included in his taxable estate under section 2038(a)(1) of the *Internal Revenue Code*. *Id.* at 893.

207. *Stuit v. Commissioner*, 54 T.C. 580 (1970). In *Stuit* a grandmother transferred publicly traded stock she owned into her name as custodian for her minor grandchildren. *Id.* Under section 2038(a)(1) of the *Internal Revenue Code*, the value of the stock at her death was included in her taxable estate, because under the applicable Illinois statute, the custodian at all times retained the power to distribute UGMA assets to the minor beneficiaries. *Id.* at 582. The argument made by the estate, that the UGMA stock should be excluded from the custodian's estate, because she had to act for the minor's benefit, and that constituted an ascertainable stand and limiting her distributions, was rejected. *Id.* at 584.

208. *Exch. Bank & Trust Co. of Fla. v. United States*, 694 F.2d 1261, 1263 (Fed. Cir. 1982). The court noted that:

the custodian is vested with broad discretionary authority over the assets held. The custodian may (1) use income or principal for the minor's support, maintenance, education or benefit; (2) control the timing of the enjoyment of the gift through the power to withhold or advance income and principal; and (3) terminate the relationship by distributing all the assets to the minor.

Id.

209. *Id.* The reciprocal trust doctrine allows inclusion in a decedent's estate of assets in an irrevocable trust, where decedent was not the trustee or beneficiary of the trust, but decedent's

tried, the court recognized that each parent could just have easily created a UTMA account of which he or she was the custodian. Had that been done, upon the death of the grantor-parent while serving as custodian, the UTMA account value would have been included in the deceased custodian's estate. There was no reason to alter the estate tax outcome merely because each grantor named his spouse as custodian rather than himself.²¹⁰ This conclusion follows even if estate tax avoidance was not the factor motivating creation of the reciprocal UTMA accounts.²¹¹ In light of the foregoing, at a minimum both parents of the minor should not be creating UTMA accounts for their children on which their spouse is the custodian. A more conservative approach to avoid adverse estate tax consequences to the parent-grantor would be to have someone other than the minor beneficiary's parent or the grantor serve as custodian.

When the grantor/custodian dies, further inquiry may be warranted to determine if there is a basis for excluding the assets titled in grantor's name as custodian from grantor's taxable estate. If grantor, during grantor's life, took action reflecting intent to resign as custodian, relinquish grantor's rights as custodian, or distribute the custodianship assets to the minor beneficiary, the custodianship assets may avoid inclusion in grantor's taxable estate.²¹²

spouse is a life beneficiary and decedent's issue or other beneficiaries are designated, and decedent's spouse created an identical trust. *United States v. Estate of Grace*, 395 U.S. 316, 325 (1969). In *Estate of Grace*, the trusts were interrelated, being part of a mutual scheme or plan of grantors to benefit each other and the same remainder beneficiaries. *Id.* The arrangement left the grantors in essentially the same position as they would have been in had they each created a trust for their own benefit as opposed to their spouse's benefit. *Id.* The outcome where irrevocable trusts were created was that the assets in the trust created by decedent were included in the grantor's gross estate for federal estate tax purposes. *Id.*

210. See *Exch. Bank & Trust Co. of Fla.* 694 F.2d at 1261. A husband and wife both purchased and inherited real property. *Id.* at 1262. They formed a corporation of which they were both shareholders, and then each gifted shares of stock in the closely held corporation to their spouse as custodian for the couple's minor children. *Exch. Bank & Trust Co. of Fla. v. United States*, 694 F.2d 1261, 1262 (Fed. Cir. 1982). The couple repeated these gifts to UGMA accounts four different times between 1960-1962. *Id.* When the husband died he was custodian of UGMA accounts for his two minor children. *Id.* His surviving spouse was likewise custodian of two UGMA accounts for the same minor children. *Id.* The I.R.S. successfully claimed that the UGMA accounts of which decedent was custodian for his minor children were included in his taxable gross estate. *Id.* at 1263.

211. *Id.* at 1266 n.9. Nor does it matter that each parent funded the UTMA account with his or her separately owned earned assets. See *id.* at 1266.

212. *Estate of Vogel v. Commissioner*, 36 T.C.M. (CCH) 875, 877-78 (1977). In *Estate of Vogel*, a grandmother titled stock in her name as custodian for her minor grandchildren under Minnesota UGMA. *Id.* at 876. She thereafter forwarded the original stock certificates to the minors' parent. *Id.* When stock dividends or cash were received, they too were sent by grantor to the beneficiaries' parent. *Id.* Shortly before grantor's death a stock dividend was received by grantor. *Id.* Due to advanced age and illness, these last shares were not for-

Furthermore, if the decedent was custodian for his minor child at the decedent's death, but the decedent was not the grantor or transferor of the assets, the UTMA assets may be excluded from the decedent's taxable estate.²¹³

If a grantor desires to avoid inclusion in assets gifted during life in his taxable estate, grantor's purpose may be accomplished by selection of a proper custodian or by creation of an irrevocable trust for the minor.²¹⁴

The final tax question is who is responsible for reporting and paying income tax on the income earned in the UTMA account. Income earned on a UTMA account is generally taxable income to the minor beneficiary, whether or not income is distributed to or expended for the minor, or retained in the account and accumulated.²¹⁵ The minor beneficiary, not the gran-

warded and remained in the custodian's possession at her death. *Estate of Vogel*, 36 T.C.M. (CCH) at 877. The I.R.S. argued that all shares were included in the grantor's taxable estate, because they were all titled in her name as custodian at her demise. *Id.* at 876. The court agreed with the taxpayer's position that the grantor had effectively distributed all custodianship assets and her actions evidenced intent to release all custodianship powers. *Id.* at 877. In light of these distributions, the stock certificates titled in custodianship name but delivered to the beneficiaries' parent were not included in decedent's taxable estate. *Id.* at 877-78.

213. *Estate of Folks v. Commissioner*, 43 T.C.M. (CCH) 427, 436 (1982). In *Estate of Folks*, Mr. Folks, at his death, owned stock in a closely held corporation in his name as custodian for his minor child. *Id.* That custodianship was established pursuant to a contract under which decedent's mother transferred the shares to decedent as custodian in exchange for valuable consideration. *Id.* at 430. Because the stock was transferred from decedent's mother rather than from decedent, the shares were not included in decedent's taxable estate. *Id.* at 436.

214. *See Estate of Chrysler v. Commissioner*, 44 T.C. 55 (1965). In that case assets in irrevocable trusts created by decedent for the benefit of his minor children remaining in the trusts at grantor's death were not included in his taxable estate. *Id.* However, the securities titled in decedent's name as custodian for his minor children, located in a safe deposit box jointly rented by decedent and his spouse, were included. *See id.* No other documents were in the safe deposit box. *Id.* at 58. Both sections 2036 and 2038 of the *Internal Revenue Code* justified the court's conclusion. *Id.* at 68-69.

215. *Anastasio v. Commissioner*, 67 T.C. 814, 818 (1977). In that case a twenty-year-old purchased a lottery ticket and won \$100,000.00 from the New York State lottery. *Id.* at 815. As he was a minor, under applicable law, the lottery winnings were paid to his parents as custodians and deposited in a UGMA account. *Id.* For the following year, when the child attained age twenty-one, the parents filed a fiduciary federal income tax return reporting the lottery winnings and interest earned thereon, as well as the distribution of all sums to the lottery winner. *Id.* Taxpayer's argument that he should not be liable for income tax on the winnings until they were distributed to him from the UGMA account was rejected. *Id.* at 815-16. As the taxpayer had all economic benefits of his winnings in the year he won the lottery, subject only to the UGMA requirements that his parents invest the monies until the taxpayer was age twenty-one, the economic benefit theory justified requiring the minor to report and pay income tax on his winnings and the interest thereon in the year he won the lottery and the winnings were deposited into a UGMA account for his benefit. *Anastasio*, 67 T.C. at 817-18. The court declined to treat the UGMA account as if it were a trust, hence tax alternatives

tor/custodian, is entitled to deductions for any losses suffered on investments.²¹⁶

However, if the grantor is custodian of the UTMA account, and after its creation and funding, he uses account assets for personal investments titled in his name individually; the court may find that a completed gift to the UTMA account did not occur for federal income tax purposes.²¹⁷ Where after a transfer of title of an asset from grantor to grantor as custodian, grantor has not relinquished dominion and control over the asset, but instead retains dominion, control, and the economic benefit of the asset for himself personally, a completed gift for federal income tax purposes has not occurred.²¹⁸ This could result in all income and gains on the UTMA account being taxable to grantor personally.²¹⁹

available with a trust were not available to custodians of a New York UGMA account. *Id.* at 818. The so-called "kiddie tax" may lessen the income tax benefits of transfers to UTMA accounts. I.R.C. § 1(g) (2000).

216. *Roman v. Commissioner*, No. 4370-95, 1997 WL 122832, at *8 (T.C. Mar. 19, 1997). In *Roman*, the father of a child contributed assets to a UGMA account of which the father served as custodian and his minor child was a beneficiary. *Id.* The account was opened and maintained at a discount broker, and funds in the account were used to purchase securities. *Id.* When the securities declined in value, the custodian sold them at a loss. *Id.* The sale occurred after the date on which the son was entitled to receive the account under applicable law. *Id.* The custodian's attempt to claim the loss on his personal income tax return was unsuccessful. *Roman*, 1997 WL 122832, at *8. The account was properly titled in the father's name as custodian for his son, the son's social security number was on the account, and all brokerage statements were issued to the father as custodian. *Id.* The son, rather than the grantor/custodian, was to report any income and was entitled to deductions for losses. *Id.*

217. *Gray v. United States*, 738 F. Supp. 453, 458 (N.D. Ala. 1990).

218. *See id.* at 457.

219. *Id.* at 458. In *Gray*, a donor owned a substantial number of shares of stock in a closely held bank corporation, and was a member of the Board of Directors of the bank. *Id.* at 454-55. At a time when he claimed to have no knowledge of a proposed merger of that bank with another financial institution, and as part of his estate plan, he transferred shares of bank stock to himself as "guardian" (rather than custodian) for his minor children. *Id.* at 455. While the donor may have been unaware of the proposed merger, information about it was available. *Gray*, 738 F. Supp. at 455. The donor failed to file gift tax returns reflecting the transfers, although his accountant informed him that they were due. *Id.* Donor retained possession of the stock certificates after the alleged transfers to his minor children. *Id.* at 457. When the merger occurred and the shares were redeemed, he accepted checks for all shares, and although three checks were payable to him as custodian, he deposited all funds in his personal account. *Id.* at 455. He then used the funds to purchase certificates of deposit, one of which was titled solely in his name, and thereafter continued investing the funds for himself. *Id.* at 455-56. As donor commingled the funds with his own after the alleged gifts to his UTMA accounts, and at all times retained dominion, control and economic benefit of the stocks transferred and their proceeds, the court held that an irrevocable transfer to UTMA accounts had not occurred for federal gift tax purposes. *Gray*, 738 F. Supp. at 457. The court held that the grantor was subject to tax on the gains on the stock sales and interest income

Owners of stock in closely held corporations, at times, have attempted to shift income and profits of the corporation to minors in a lower income tax bracket with mixed results. Merely titling the stock in custodianship name and delivering the stock to the custodian, combined with filing income tax returns for the minor reflecting receipt of income from the corporation, will not suffice to shift the income tax burden to the minor.²²⁰ However, where the facts indicate that the grantor relinquished control over the gifted shares and the custodian took action to protect the shares gifted and the minor's beneficiary interest in the corporation, the transfer may be respected for income tax purposes.²²¹

Similarly, where a grantor transfers assets to a custodianship account for his children, he continues to manage the accounts, solely directs all trades in the accounts, personally provides loans to the custodianship account to make further investments without promissory notes or definite interest rates or repayment dates, and repays the loans with profits from trades at his own discretion, the grantor is liable for income tax on all gains realized on the custodianship accounts.²²² Because the grantor/custodian continued to personally use the custodianship assets, retained total control over them, and the minor beneficiaries received no present benefit, the income tax burden was not shifted to the children.²²³

However, where a grantor transferred limited partnership interests to his wife, as custodian for the couple's minor children, in exchange for consideration gifted by the grantor to the minors, the court upheld the children's liability for income tax on partnership income.²²⁴ The court reached this conclusion despite the facts that the grantor continued to operate the business as general partner, and the custodian was not sufficiently educated or informed to protect the interests of the minor beneficiaries.²²⁵

As noted above, income earned on a UTMA account is generally required to be reported for federal income tax purposes by the minor beneficiary, and it is this beneficiary who pays any income tax due. An exception

earned. *Id.* His failure to inquire about his rights and responsibilities and to correctly report the transactions on his returns lead to imposition of a negligence penalty. *Id.* at 458.

220. See *Duarte v. Commissioner*, 44 T.C. 193, 197 (1965).

221. *Kirkpatrick v. Commissioner*, 36 T.C.M. (CCH) 1122, 1126 (1977).

222. *Estate of Applestein v. Commissioner*, 80 T.C. 331, 349-50 (1983).

223. *Id.* at 351.

224. *Sharon v. Commissioner*, 57 T.C.M. (CCH) 1562, 1563 (1989) (providing an example of real estate and partnership interests owned by a father/donor/custodian and managed in UGMA accounts for his daughters); *Garcia v. Commissioner*, 48 T.C.M. (CCH) 425, 427, 437 (1984). The UGMA accounts were upheld for income tax purposes. *Sharon*, 57 T.C.M. (CCH) at 1568.

225. *Garcia*, 48 T.C.M. (CCH) at 436.

exists if the income is used for the support of the minor. In that situation the person legally obligated to support the minor must report the income and pay any tax due.²²⁶ This is true regardless of the relationship between the grantor or custodian and the beneficiary.²²⁷

While the minor is taxed on the income earned by the UTMA account, there are situations under the federal tax law where the grantor/custodian may be treated as owning the assets in the account. For example, in *Robishaw v. United States*,²²⁸ a question arose concerning whether a taxpayer owned more than eighty percent of the outstanding stock of a corporation.²²⁹ If he did, capital gain treatment of a sale could be denied.²³⁰ The shares in the corporation held by the grantor/custodian in a UGMA account for his minor child were, for the purpose of the litigation in *Robishaw*, treated as owned by the taxpayer.²³¹

Questions concerning the validity and effectiveness for federal tax purposes of purported transfers of assets to custodianship accounts arise in connection with other tax issues, such as whether the payor of sums to a UGMA account is entitled to a deduction for interest expense,²³² and the proper basis of assets for depreciation purposes.²³³ The outcome frequently depends on the extent of control retained by a grantor after the transfers to custodianships.²³⁴ Where the transfer to the minor was not to a UTMA account, but

226. Rev. Rul. 56-484, 1956-2 C.B. 23; Rev. Rul. 59-357, 1959-2 C.B. 212; Rev. Rul. 70-348, 1970-2 C.B. 193; *Estate of Cardulla v. Commissioner*, 591 T.C.M. 1512 n.8 (1986); see also *T.J. Henry Assocs., Inc. v. Commissioner*, 80 T.C. 886, 889 (1983); *Garriss Inv. Corp. v. Commissioner*, 43 T.C.M. (CCH) 396 (1980). *Garriss* involved a situation in which a mother opened joint bank accounts with her children, deposited monies in the accounts, and used monies in the accounts for the support of her children. *Garriss*, 43 T.C.M. (CCH) at 400. The court referenced the North Carolina UGMA, and noted that “[w]hen a parent makes a gift to a child under [UGMA], income from the gift that is used to support the child is taxable to the person who is legally liable for such support.” *Id.* at 405-06.

227. Rev. Rul. 56-484, 1956-2 C.B. 23.

228. 616 F.2d 507 (Ct. Cl. 1980).

229. *Id.* at 510.

230. *Id.*

231. *Id.* at 511.

232. *Trans-Atlantic Co. v. Commissioner*, 1970 WL 1834, at *15 (Nov. 3, 1970). In that case, shareholders in a corporation assigned debentures owed by the corporation to trusts for the benefit of their minor children. *Id.* at *3. The trusts permitted payments to UGMA accounts for the minor trust beneficiaries. *Id.* at *4. The court held that the payments on the debentures were not interest deductible by the corporation. *Id.* at *15.

233. *D’Angelo Assocs., Inc. v. Commissioner*, 70 T.C. 121, 128 (1978).

234. *Id.* at 132. In *D’Angelo* an important issue was whether section 351 of the *Internal Revenue Code* applied to a series of transactions engaged in by the taxpayer. *Id.* at 128. The court found that grantor remained in control of the corporation after the transfers to minors and throughout the series of transactions in question. *Id.* at 131. Hence, section 351 of the

was to a trustee, and was revocable, the grantor remains liable for income tax on income earned on the account.²³⁵

Similarly, where taxpayers own several corporations, transfer shares of stock in one corporation to family members in an effort to shift income to them, and the corporation which the taxpayers continue to own pays income to the corporation owned by the taxpayers' relative; the transferring taxpayers remain liable for income tax on dividends paid to the taxpayers' relatives.²³⁶ The court stated that "the shifting of funds between corporations for the purpose of directing income to children of the common, controlling shareholder provides a direct, personal benefit to the shareholder, which gives rise to constructive dividend treatment."²³⁷

Cases arise concerning the transfer of closely held corporate stock to UTMA accounts. Where the stock is in an electing S-corporation, care must be taken to timely file a new selection. Failure to do so after a transfer to a custodianship results in a loss of the S-corporation status of the business.²³⁸

XIII. EXPENSES AND FEES

Although, as a practical matter, custodians may not charge a fee for their services or incur any substantial expenses, a custodian of a UTMA account has a right to receive reasonable compensation for services performed during the year.²³⁹ The custodian is also entitled to reimbursement for expenses reasonably incurred in managing the account.²⁴⁰

Internal Revenue Code applied to the transaction as contended by the Internal Revenue Service. *Id.* at 136.

235. *Heintz v. Commissioner*, 41 T.C.M. (CCH) 429, 430-31 (1980). In that case parents deposited funds in bank accounts in their names "as joint trustees" for their minor children. *Id.* at 430. Documentation to open several of the accounts did not expressly indicate that the transfers were revocable, but since it was expressly stated that several of the trusts were revocable, and the other trusts did not say the trusts were irrevocable, they were also deemed to be revocable. *Id.* at 430-31. Because the parents had not complied with California UGMA in opening the accounts, the parents owed income tax on the interest earned on the accounts. *Id.* at 431.

236. *See generally Bell v. Commissioner*, 45 T.C.M. (CCH) 97 (1982). In that case three physicians owned a medical practice and formed a separate corporation to operate an X-ray business. *Id.* at 99. Shareholders transferred stock in the X-ray corporation to family members. *Id.* at 102.

237. *Id.* at 111; *see Horn v. Commissioner*, 45 T.C.M. (CCH) 413 (1982).

238. *T.J. Henry Assocs., Inc. v. Commissioner*, 80 T.C. 886, 891 (1983).

239. *FLA. STAT. § 710.117(2)* (2003).

240. *§ 710.117(1)*.

XIV. OTHER IMPACTS AND RISKS OF UTMA ACCOUNTS

A minor's UTMA account may impact other legal matters. Minors are generally entitled to be supported by one or both of their parents.²⁴¹ In a dissolution of marriage, a court may consider the assets owned by or available to a child in determining the parents' obligations to pay child support.²⁴² Courts may also consider the existence of custodianship accounts, the earnings thereon and distributions there from in determining the support provided by divorced parents for their child, the support contributed by the child, and who is entitled to a dependency exemption for the child.²⁴³ Courts, in the context of a divorce, may need to determine if custodianship accounts were effectively created, or if the assets in them belong to the parents as marital property or community property.²⁴⁴ Hence, the existence of a UTMA account available to a minor whose parents' marriage is dissolved may affect the child support that either or both parents are obligated to pay. The existence of a custodianship account should also be considered in terms of potential impact on a disabled beneficiary's eligibility for government benefits.²⁴⁵

XV. CONCLUSION

Due to the frequent use of UTMA accounts nationwide and the benefits they may offer to donors, they warrant closer scrutiny by attorneys and more elucidation by the legislatures facilitating their operation. Attorneys, stockbrokers, accountants, bankers, and financial advisors perform a valuable ser-

241. § 61.13(1)(a).

242. § 61.30(11)(a)(2), (11)(a)(7).

243. See generally *Muraca v. Commissioner*, 47 T.C.M. (CCH) 1762 (1984). The parents in that case were divorced, and each contributed sums for the support of their minor son. *Id.* at 1765. The father contributed sums to a Pennsylvania UGMA account of which he was custodian. *Id.* at 1768. Stocks in the account were sold, and some of the proceeds were distributed to the son for his support. *Id.* at 1768. Although the father established the account, the distributions were not considered support paid by him. *Id.* However, additional contributions to the account provided by the father, which were subsequently withdrawn and used for the son's support were considered payments by the father for dependency exemption purposes. *Muraca*, 47 T.C.M. (CCH) at 1768.

244. See *Allen v. Allen*, 301 So. 2d 417, 419–20 (La. Ct. App. 1974) (rejecting the position that assets in an UGMA account were community property, due to the parties failure to comply with certain statutory formalities); see also *In re Jacobs*, 180 Cal. Rptr. 234, 242 (Ct. App. 1982) (finding that donative intent to create custodianship accounts was lacking when the question arose in a divorce case).

245. See *Cruz v. Apfel*, 48 F. Supp. 2d 375, 378 (S.D.N.Y. 1999). In that case the minor was already the owner of the asset, hence the attempt to transfer to an UGMA account was invalid. *Id.* The transfer attempt was an effort to render the minor eligible for government benefits. *Id.* at 376.

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vice for customers if they are knowledgeable about UTMA accounts and take the initiative to provide relevant information and guidance to their customers.

A TAX PROFESSOR'S JOURNEY INTO LAW AND POPULAR CULTURE

GAIL LEVIN RICHMOND*

On December 28, 1999, Bankruptcy Judge A. Jay Cristol issued an “order determining that the Internal Revenue Service is still naughty and not nice.”¹ Perhaps the holiday season,² coupled with popular perceptions of the IRS,³ occasioned this choice of language. But perhaps it merely reflected the judge’s literary sensibilities. As a law professor, I’m not surprised when a judge cites a work of fiction.⁴ Faculty members have done it for years. If law school professors draw from popular culture in their teaching and writing, why shouldn’t judges? Or is it the fact that the case involved tax that surprises non-tax lawyers?

Many tax professors remember a time when it was fun to be a tax professor, a time when colleagues conversed with us in months other than April, a time when we weren’t shunned for being ignorant of semiotics.⁵ Some of

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1. *In re Cohen*, 85 A.F.T.R.2d 489, 2000-1 U.S.T.C. ¶ 50,161 (Bankr. S.D. Fla. 1999).

2. See HAVEN GILLESPIE & J. FRED COOTS, *SANTA CLAUS IS COMING TO TOWN* (1934).

3. E.g., DR. SEUSS, *HOW THE GRINCH STOLE CHRISTMAS* (1957).

4. References to fictional works can be divided into two categories. The larger category includes any reference to a fictional work. The second category, a subset of the first, covers those works that actually revolve around lawyers and their clients. Fictional works in this category represent the intersection of law and popular culture. Judicial opinions include both types of reference. See, e.g., *Greene v. United States*, 185 F.3d 67, 69 (2d Cir. 1999) (“This divergence is so out of the ordinary that, upon an initial reading of § 1256, a person might feel like Dorothy did upon finding herself transported to the Land of Oz, and, speaking to her dog, said: ‘Toto, I’ve a feeling we’re not in Kansas anymore.’”); *United States v. Noah*, 130 F.3d 490, 493 (1st Cir. 1997) (“Noah insists, in a mien reminiscent of the legendary Perry Mason, that the evidence produced at his trial actually establishes the guilt of a third person.”); *Brown v. United States*, 74 A.F.T.R.2d 5096, 5098 n.2 (N.D. Ga. 1994) (“While this court expresses no opinion as to the issue of whether or how much taxes are owed, the court is reminded of an excerpt from Charles Dickens’ *David Copperfield*: ‘It was as true . . . as turnips is. It was as true . . . as taxes is. And nothing’ truer than them.’”).

5. See Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1753–54 (1998) (footnote omitted):

Tax professors are the air-fresheners of the American law school. If a tax prof tries to talk about serious tax research with a bunch of law school generalists, the room clears out instantly. We tax law types are expected to sit, without nodding off, through interminable discussions on Satanism and the First Amendment. But raise one tax question with a con law person, and he’s gone: “Sorry. I just remembered I have to meet with a student.”

Id. See generally Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994).

us strive to reconnect by teaching non-tax subjects, showing movies in class, writing about fictional lawyers, publishing in journals that omit “tax” from their titles,⁶ and creating titles that illustrate how truly creative a group we are.⁷

If my experiences during the 1999-2000 academic year are typical, popular culture can lead to unexpected behavior. That year, I showed a movie segment in class for the first time and passed up a college basketball game to watch the opening and closing credits of *Air Force One*.⁸ The events that prompted a classroom traditionalist⁹ and basketball fanatic¹⁰ to take these actions were totally attributable to law and popular culture. Although I committed these transgressions, I’m not planning to don a Scarlet R (for relevance) yet. As the saga below illustrates, popular culture led me to linkages I might never have made when I was a “pure” tax professor. Although I remain primarily a traditionalist, I believe my diversion that year continues to have value.

6. Although student-edited journals that include tax in their titles can be counted on the fingers of one hand, environmental law journals abound. Aren’t their statutes and regulations as challenging as ours? I quickly ran out of digits while counting the number of international law reviews. See generally *On-Line Directory of Law Reviews and Scholarly Legal Periodicals* (Michael H. Hoffheimer, compiler), <http://www.lexisnexis.com/lawschool/faculty/lawreviews> (last visited Apr. 6, 2004).

7. See, e.g., James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999); William J. Turner, *The Pink Panther Meets the Grim Reaper: Estate Taxation of the Fruits of Crime*, 72 N.C. L. REV. 163 (1993); Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer’s Account of Enlightenment*, 40 DEPAUL L. REV. 611 (1991).

8. AIR FORCE ONE (Columbia/Tristar Studios 1997). Don’t ask why I didn’t tape the game. I’m a tax professor, not an engineer, and neither of my VCR-savvy children was home that night. Being technologically challenged, I had to watch the entire movie to ensure that I didn’t miss any of the relevant credits.

9. But I do teach a summer course entitled “Income Tax for the Uninterested,” using non-tax cases, such as defamation suits involving famous individuals, to introduce the relevant tax consequences. See, e.g., *Faigin v. Kelly*, 978 F. Supp. 420 (D.N.H. 1997).

10. Basketball is a way of life in my home state of Indiana. Remember the movie *Hoo-siers*? A few facts were changed, but the passion trumps Hollywood hyperbole. Indeed, nine of the top ten high school gyms in terms of seating capacity are in Indiana. See Sal Ruibal, *Fieldhouse a cathedral to high school hoops*, USA TODAY, Feb. 26, 2004, at 3C.

PRELIMINARY HISTORY

The saga actually begins in 1992, when I co-authored a moderately frivolous article/play geared to law librarians.¹¹ My co-author and I made another foray into “play-writing” in a 1993 symposium on legal humor.¹² She moved to another law school in 1994, and I returned to more serious work.

In late 1996, two of my colleagues, knowing that I was an avid fan of *Law & Order*,¹³ asked me to write a chapter for a book on television lawyers.¹⁴ Although they offered me *Matlock* instead of *Law & Order*, I considered it my duty to accept and begin field work back in North Carolina, where Andy Griffith grew up.¹⁵ Along the way I learned a lot about sports franchises in the South, Southern mystery writers, and race relations. Based on that chapter and the work mentioned above, I “joined” my school’s popular culture faculty.¹⁶

FROM LOUIS AUCHINCLOSS TO PAUL NEWMAN

The previous section sets the background; my real immersion into popular culture began a few years later. On July 1, 1999, one of the *Prime Time Law* co-editors e-mailed a call for papers for an admiralty popular culture symposium. He planned “to show how often maritime law and lawyers have been presented in works of popular culture.”¹⁷ I answered quickly and flip-

11. Carol A. Roehrenbeck & Gail Levin Richmond, *Three Researchers in Search of an Alcove: A Play in Six Acts*, 84 LAW LIBR. J. 13 (1992). We had a serious purpose—proselytizing for tax alcoves—and reported on our survey of law school law librarians.

12. Gail Levin Richmond & Carol A. Roehrenbeck, *From Tedious to Trendy: A Tax Teacher's Triumph*, 17 NOVA L. REV. 739 (1993).

13. *Law & Order* (NBC television broadcast, since 1990). My law school transcript indicates that I know virtually nothing about Criminal Law, but basketball isn't on every night.

14. PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE (Robert M. Jarvis & Paul R. Joseph, eds., 1998).

15. I acknowledge Professor Joseph J. Kalo of the University of North Carolina-Chapel Hill School of Law for giving up his ticket so that I could attend a UNC-Wake Forest basketball game during one of my research visits.

16. Several members of my faculty are known for their involvement in law and popular culture scholarship. See, e.g., Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281; Robert M. Jarvis, *Legal Tales from Gilligan's Island*, 39 SANTA CLARA L. REV. 185 (1998); Paul R. Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation"*, 24 U. TOL. L. REV. 43 (1992).

17. E-mail from Robert M. Jarvis to *Prime Time Law* contributors (July 1, 1999) (on file with author).

pantly: "Of course I'd be interested—it was too bad that no fictional material linking tax and admiralty existed." Soon thereafter he called my bluff and produced a volume of short stories by Louis Auchincloss.¹⁸ That collection of works, about the fictional firm of Tower, Tilney & Webb, included a story entitled "The Deductible Yacht." In that instant I became a symposium contributor for the *Journal of Maritime Law and Commerce*.¹⁹

The story's protagonist was an associate, Bayard Kip, who determined that his client was not entitled to deduct entertainment expenses associated with his yacht because the guests were not sufficiently related to his trade or business activities.²⁰ The story included Kip's family background, the possibility that he wouldn't be considered for partnership when he refused to sign the tax return, and words of advice from a cynical revenue agent.²¹

After beginning an outline of topics to pursue, I read the other stories to find additional instances of tax or admiralty being important to the firm.²² I struck out with admiralty but tax turned out to be the mother lode that would lead me, ultimately, to *Air Force One*.

The Deductible Yacht was not Kip's only appearance in this book. Appearing at a partners' lunch, he was asked to report on a conference with Commissioner Caplin regarding the elimination of tax deductions for business entertainment.²³ Eureka! I'm old enough to know that there really was a Commissioner Caplin, and a web search yielded an article by him on that very same topic.²⁴ Now I was in business. I could devote space to the changes in I.R.C. section 274 between 1961 and 1999, detail other problems

18. See LOUIS AUCHINCLOSS, *POWERS OF ATTORNEY* (1963).

19. Gail Levin Richmond, *The (Once) Deductible Yacht*, 31 J. MAR. L. & COM. 593 (2000).

20. Interested readers will find my descriptive limerick in *The (Once) Deductible Yacht*. *Id.*

21. *Id.*

22. Remember, I had "joined" the law and popular culture group in 1996, so this was serious research and not merely time spent away from class preparation or other writing.

23. AUCHINCLOSS, *supra* note 18, at 176.

24. Mortimer M. Caplin, *The Travel and Entertainment Expense Problem*, 39 TAXES 947 (1961). My visit to Caplin & Drysdale's web site (www.caplindrysdale.com) establishes my willingness (although not necessarily my eagerness) to use alternative research tools. Fortunately, I was able to read the Caplin article in hard copy (a hearty thanks to all previous NSU law library directors for collecting all these old volumes), for it led to a discovery I would not have made online. Once I had the volume of *Taxes* in my hands, I did what every self-respecting book lover does; I leafed through it to see what else might be there. Double Eureka! I found articles by an attorney named Victor R. Wolder. See, Victor R. Wolder, *How the Tax Court Treats Reasonable Compensation*, 39 TAXES 473 (1961). When my class reached *Wolder v. Commissioner*, 493 F.2d 608 (2d Cir. 1974), in the casebook, they were amazed to learn that Mr. Wolder was a tax lawyer.

that might have tempted high-income taxpayers in the early 1960s,²⁵ and report on the real-world aspect of Auchincloss's text.

The Deductible Yacht ends with information about the client stinging another company for the yacht, which turned out to have a split main shaft. My symposium editor wondered whether the other company was a buyer, a creditor, or an insurer and suggested I ask Mr. Auchincloss. Taking advantage of my opportunity, I not only asked Mr. Auchincloss about the company that was stung and the fictional law firm, I also mentioned that I enjoyed his mention of Commissioner Caplin. In his response, Mr. Auchincloss noted that he and Caplin were old friends.²⁶

That was just the beginning. At the back of my mind was *The Heroic Nature of Tax Lawyers*,²⁷ a review of *The Firm* whose title I liked. Bayard Kip may not have faced as dangerous a group as did Mitch McDeere, but he still acted heroically in refusing to sign the client's return.²⁸ If Tom Cruise could play McDeere, who might have played Kip in the early 1960s? From the dim recesses of my mind, I remembered *The Young Philadelphians*, a 1959 movie starring Paul Newman as a tax attorney.²⁹ If you've played a tax lawyer once, why not a second time?

After "nominating" Paul Newman for the Kip role in the movie that was not made of this book, I decided to watch *The Young Philadelphians* to see what the tax issue was. Imagine this scene—a wealthy, and somewhat ditzy, older woman who sounds remarkably like Glinda the Good Witch³⁰ sits across from Paul Newman and holds a Chihuahua named Carlos. Newman dispatches his secretary to learn who the client is. A call from the senior partner explaining that she was worth at least \$50 million causes Newman to

25. E.g., high marginal tax rates, limited marital deduction, and modest gift and estate tax exemptions.

26. Response from Louis Auchincloss to Gail Levin Richmond (postmarked Oct. 6, 1999) (on file with author). Both earned their law degrees at the University of Virginia, Caplin in 1940 and Auchincloss in 1941. University of Virginia, Notable Alumni: Literature, at <http://www.virginia.edu/notablealumni/> (last visited Apr. 6, 2004).

27. Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367 (1991).

28. Although Jensen insists that big-firm tax lawyers do not spend most of their time filling out hundreds of individual tax returns, tax lawyers at Tower, Tilney & Webb definitely prepared returns. *Id.* at 376; AUCHINCLOSS, *supra* note 18, at 88–89. In his autobiography, Auchincloss laments seeing the merger of corporate and personal work into "the great sea of taxation and the practice of law evolve into something more like accounting." LOUIS AUCHINCLOSS, *A WRITER'S CAPITAL* 89 (1974).

29. *THE YOUNG PHILADELPHIANS* (Warner Brothers 1959). I am not making this up. Although I didn't recall exactly what it was, I really remembered there was something about tax in the movie. Perhaps my adolescent brain filed it away because it knew I was destined to be a tax lawyer.

30. Of course she sounded like Glinda. Billie Burke played both roles.

reach for Carlos. The ensuing dialogue begins with Burke lamenting how many dogs aren't loved. Thank goodness for the SPCA, to which she gives \$5,000 per year.

Newman: "In cash?"

Burke: "Well, of course. How else?"³¹

Eventually Newman explains the advantage of making the gift with appreciated securities and avoiding the capital gains tax. A few scenes later, Burke leaves her old firm and becomes Newman's client.

Obviously, I had to play this scene for my income tax class. And, as Paul Newman was the star, I had to watch the entire movie myself. That led me to *Air Force One*.

FROM PAUL NEWMAN TO JEROME SHESTACK AND *AIR FORCE ONE*

Newman's character, Anthony Lawrence, joined a fictional Philadelphia law firm, Wharton, Biddle & Clayton. As Lawrence climbed in the firm, passing his less-talented peers, his name moved up on the lobby listing. Wait, freeze the frame!³² One of the listed lawyers, Jerome J. Shestack, wasn't fictional. A Wolf, Block, Schorr and Solis-Cohen LLP partner, Mr. Shestack served as American Bar Association President in 1997-1998. I could not rest without knowing why his name appears in the movie and asked him about this in an e-mail.³³

Mr. Shestack called back to explain his role as a technical advisor and the director's insertion of his name. He added that his son produced movies, including *Air Force One*, and had cast Mr. Shestack's wife in them. After that, how could I not watch the movie?³⁴

31. THE YOUNG PHILADELPHIANS, *supra* note 29.

32. Had I not watched the movie on a VCR, I probably would never have even noticed this listing.

33. In a twist of "six degrees of Kevin Bacon," I was not being totally presumptuous. I actually knew Jerome Shestack. We'd served together on an ABA site inspection team a few years earlier.

34. The two movies have another commonality. Harrison Ford, the star of *Air Force One*, and Paul Newman have been recognized for both their looks and their acting. See, e.g., *Paul Newman Voted Greatest Actor*, CNN.com, at <http://www.cnn.com/2001/SHOWBIZ/Movies/01/16/Newman/> (Apr. 6, 2004). The article, which ranked Ford fourth, noted that its rankings included "box office success, Oscar nominations, acting range and marriage appeal"

CONCLUSION

Actually, there is no conclusion. I put popular culture on hold for awhile because Foundation Press thought I should finish the sixth edition of *Federal Tax Research*. Although I realized their idea of camera-ready copy didn't include Paul Newman, I didn't regret for a moment a scholarly detour that led to correspondence with both Louis Auchincloss and Jerry Shestack and a few good nights watching movies.

Now I'm back with a vengeance. My Tax and Wills classes watch *The Young Philadelphians* (the tax scene does begin with Billie Burke's desire to change her will), my Accounting class has viewed *The Producers*, and there's a tax scene in *Giant* I'll be adding next year.³⁵ I'm now editing a humor column for the ABA Section of Taxation newsletter. It includes more judicial quotations and my most recent ditty, "Hummer, 1– Section 280F, 0: A Scorekeeper's Limerick."³⁶

35. Is there a "back to my childhood theme" here? The young Elizabeth Taylor and Rock Hudson certainly complement the young Paul Newman.

36. *Tax Bites*, NEWSQUARTERLY, Winter 2004, at 28.

THE USE OF PATTERN-AND-PRACTICE BY INDIVIDUALS IN NON-CLASS CLAIMS

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I. INTRODUCTION

In 1998, MCI International, Inc. (“MCI”) laid off ninety-four employees, seventy-seven percent of whom were over the age of forty.¹ The Equal Employment Opportunity Commission (“EEOC”) sued MCI on behalf of thirty-nine of the laid-off employees, arguing that the layoff violated the Age Discrimination in Employment Act (“ADEA”).² The court refused to con-

* Special thanks to Richard A. Bales, Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University, and Gail M. Langendorf.

1. EEOC v. MCI Int’l, Inc., 829 F. Supp. 1438, 1479–80 (D.N.J. 1993).

2. *Id.* at 1444.

sider the case as a class action, and instead treated it as thirty-nine separate disparate treatment cases.³

One of the laid-off employees was Donald Lee.⁴ MCI argued that it had fired Lee because of poor performance, but the EEOC refuted this argument by presenting a positive letter of recommendation from Lee's second-level supervisor, which recommended Lee's re-hiring and stated that Lee's layoff was not a reflection of his performance.⁵ The district court, however, dismissed the claim, finding that Lee could not show a *prima facie* case of age discrimination because he could not point to a similarly situated individual who was treated differently.⁶

If this case had been brought as a single pattern-and-practice class action instead of as a group of individual disparate treatment claims, the outcome likely would have been different. The statistical evidence that a large proportion of the laid-off employees were over the age of forty (and therefore protected by the ADEA) would have shifted the burden of persuasion to MCI to prove that it had not discriminated against Lee.⁷ However, because the court followed the approach that most circuits have taken, that the pattern-and-practice approach to proving discrimination is not available to plaintiffs bringing individual disparate treatment cases, this route was not available to Lee, and his case was dismissed.⁸

In *International Brotherhood of Teamsters v. United States*,⁹ the United States Supreme Court held that evidence of pattern-and-practice can be used in class actions to shift the burden of proof to the employer.¹⁰ However, the Court did not address whether pattern-and-practice can be used to shift the burden of proof in individual, non-class action lawsuits.¹¹ The circuit courts are divided on this issue.

Five federal circuits have held that an individual, non-class plaintiff may not shift the burden of proof by demonstrating solely a pattern-and-practice of discrimination.¹² These courts have found that the burden-

3. *Id.* at 1446.

4. *Id.* at 1455.

5. *Id.*

6. *MCI Int'l, Inc.*, 829 F. Supp. at 1455.

7. *Id.* at 1479.

8. *Id.* at 1455.

9. 431 U.S. 324 (1977).

10. *Id.* at 360.

11. *See id.*

12. *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355-56 (5th Cir. 2001); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760-61 (4th Cir. 1998); *Gilty v. Vill. of Oak Park*, 919 F.2d

shifting method adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*¹³ is more suited for individual, non-class claims of discrimination, and that the pattern-and-practice approach, therefore, is not applicable to these types of cases.¹⁴ However, two federal circuits have found that the language in *Teamsters* and other Supreme Court cases indicate a willingness to allow the use of pattern-and-practice evidence to shift the burden of proof in individual, non-class actions.¹⁵ These courts have reasoned that evidence of a pattern-and-practice can change the position of the employer to that of a proved wrongdoer as effectively as the *McDonnell Douglas* burden-shifting method.¹⁶

This article agrees with the minority of circuits that have held that individuals can bring pattern-and-practice cases. The traditional disparate treatment model of proof, i.e., the *McDonnell Douglas* approach, works well for a plaintiff who has strong circumstantial evidence that the employer has discriminated against the particular plaintiff.¹⁷ However, problems arise when the plaintiff has overwhelming evidence that the employer engaged in a broad pattern of discrimination, but little evidence of individual discrimination. Where the plaintiff already has proven a broad pattern of intentional discrimination, the burden of persuasion should be on the employer to show that that pattern did not adversely affect the plaintiff.

Part II of this article analyzes the current types of employment discrimination under Title VII. It begins by explaining disparate impact and disparate treatment. It then analyzes the methods to prove disparate treatment, including the pattern-and-practice method, which is the subject of this article.

Part III explains the two different views on whether evidence of pattern-and-practice discrimination shifts the burden of proof to the employer. Currently, the majority of courts have held that pattern-and-practice cannot shift the burden of proof to the employer. On the other hand, a minority of courts have held that the *Teamsters* approach should be extended to include individual, non-class plaintiffs.

1247, 1252 (7th Cir. 1990); *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 469–70 (8th Cir. 1984).

13. 411 U.S. 792 (1973).

14. See *Celestine*, 266 F.3d at 355–56; *Thiessen*, 267 F.3d at 1095; *Lowery*, 158 F.3d at 760–61; *Gilty*, 919 F.2d at 1252; *Craik*, 731 F.2d at 469–70.

15. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986); *Davis v. Califano*, 613 F.2d 957, 961–62 (D.C. Cir. 1979).

16. *Cox*, 784 F.2d at 1559; *Davis*, 613 F.2d at 961–62.

17. *Davis*, 613 F.2d at 961–62.

Part IV provides a detailed analysis of the competing views. This section explains how the use of pattern-and-practice by individuals to shift the burden is consistent with past Supreme Court cases, why pattern-and-practice proves discrimination in individual, non-class actions, and how the *Teamsters* method promotes the anti-discrimination policy of Title VII.

Part V recommends that courts adopt the *Teamsters* approach in individual, non-class actions because this approach will afford the plaintiff another option when the *McDonnell Douglas* method will likely prevent the plaintiff from succeeding in an otherwise-valid discrimination claim.

II. TYPES OF DISCRIMINATION

There are two types of discrimination in the workplace: disparate impact and disparate treatment. This article focuses on pattern-and-practice evidence in disparate treatment cases. However, in order to fully understand disparate treatment cases, it is important to know how they are different from disparate impact cases. To provide this information, this article begins by analyzing disparate impact actions, and then discusses disparate treatment actions.

A. Disparate Impact

Disparate impact claims focus on whether employment policies or practices that are facially neutral and not intended to discriminate nevertheless have a disparate effect on the protected group.¹⁸ Disparate impact "seeks the removal of employment obstacles, not required by business necessity, which . . . freeze out protected groups from job opportunities and advancement."¹⁹ With this type of discrimination, the Supreme Court has ruled that a plaintiff is relieved of proving that the employer had a discriminatory motive.²⁰ Prior to *Griggs v. Duke Power Co.*,²¹ proof of discriminatory motive was critical to the plaintiff's case, as the plaintiff was required to prove that his or her employer treated the plaintiff less favorably because of his or her race.²²

Disparate impact claims involve three stages of proof.²³ First, the plaintiff must establish by a preponderance of the evidence that the employer

18. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000).

19. *Id.*

20. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

21. 401 U.S. 424 (1971).

22. Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 838-39 (1982).

23. Connecticut v. Teal, 457 U.S. 440, 446 (1982).

“uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”²⁴ Once the plaintiff establishes a *prima facie* case of disparate impact, the burden shifts to the defendant, who may either discredit the plaintiff’s statistics or proffer statistics of his own which show that no disparity exists.²⁵ The employer may also produce evidence that its disparate employment practices are based on legitimate business reasons, such as job-relatedness or business necessity.²⁶ If the defendant fails to show either, the plaintiff prevails, but if the defendant succeeds in showing a business justification, the burden of production shifts back to the plaintiff.²⁷ When this occurs, the plaintiff has the duty to show the existence of an alternative nondiscriminatory practice or policy that would also satisfy the asserted business necessity.²⁸

B. Disparate Treatment

The second type of discrimination, and perhaps the easiest to understand, is disparate treatment. Disparate treatment occurs where an “employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”²⁹ However, while the inquiry in disparate impact is not focused on discriminatory motive, proof of discriminatory motive is critical to claims of disparate treatment.³⁰ Fortunately for the plaintiff, discriminatory intent “can in some situations be inferred from the mere fact of differences in treatment.”³¹ The ultimate question in every disparate treatment case is whether the plaintiff was intentionally discriminated against.³² A plaintiff subjected to this type of discrimination has three ways to prove discrimination: proof of intent through direct evidence, the *McDonnell Douglas* approach, or pattern-and-practice.

1. Proof of Intent Through Direct Evidence

The first method a plaintiff may use to prove disparate treatment discrimination is through direct evidence. Under this theory, the plaintiff offers

24. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); *Tex. Dep’t. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

25. *Davis v. Califano*, 613 F.3d 957, 962 (D.C. Cir. 1979).

26. § 2000e-2(k)(1)(A)(i).

27. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660–61 (1989).

28. *Id.* at 661.

29. *Teamsters*, 431 U.S. at 335 n.15.

30. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

31. *Id.*

32. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

“[e]vidence, which if believed, proves existence of fact in issue without inference or presumption.”³³ The burden of production then shifts to the employer to show that it would have made the same employment decision absent its consideration of the illegal criterion.³⁴ Examples include epithets or slurs uttered by an authorized agent of the employer, a decision-maker’s admission that he or she would or did act against the plaintiff because of the plaintiff’s protected characteristic, or an employer policy framed squarely in terms of race, sex, religion, or national origin.³⁵ The Civil Rights Act of 1991 clarified the requirements of using direct evidence of discrimination.³⁶ According to the 1991 Act, the plaintiff must show that an illegitimate criterion was a “motivating factor” in the employment decision.³⁷ Additionally, the 1991 Act stated that the employer can escape damages and orders of reinstatement, hiring, and promotion by demonstrating that qualification was reasonably necessary to the normal operation of that particular business or enterprise.³⁸ However, an employer making this showing will still be liable for attorney’s fees and injunctive or declaratory relief.³⁹

2. The *McDonnell Douglas* Method

In 1973, when faced with the fact that employers seldom provide the plaintiff with direct evidence of discrimination, the Supreme Court developed a burden-shifting pattern of proof, commonly referred to as the *McDonnell Douglas* test.⁴⁰ The function of the *McDonnell Douglas* method of proof is to allow the plaintiff to raise an inference of discriminatory intent indirectly.⁴¹ It serves to eliminate the most common nondiscriminatory reasons for the employer’s action,⁴² e.g., lack of qualifications or the absence of an available job.

In *McDonnell Douglas*, the Supreme Court created a three-step process intended to create a level playing field for both the plaintiff and defendant.⁴³ The plaintiff has the initial burden of establishing a *prima facie* case of dis-

33. BLACK’S LAW DICTIONARY 460 (6th ed. 1990).

34. *Burdine*, 450 U.S. at 254.

35. *See Perry v. Woodward*, 199 F.3d 1126, 1134 (10th Cir. 1999); *see also* § 2000e-2(a)(1).

36. § 2000e-2(m).

37. *Id.*

38. § 2000e-5(g)(2)(B)(ii).

39. § 2000e-5(g)(2)(B)(i)(ii).

40. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

41. *Tex. Dep’t. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

42. *Id.*

43. 411 U.S. 792 (1973).

crimination.⁴⁴ This *prima facie* case may be proved by showing: 1) that the plaintiff belongs to a protected class; 2) that the plaintiff “applied and was qualified for a job for which the employer was seeking applicants;” 3) that the plaintiff was rejected; and 4) that, after the plaintiff’s rejection, the position remained open and the “employer continued to seek applicants from persons of [plaintiff’s] qualifications.”⁴⁵ If proven, these facts give rise to an inference that the plaintiff was rejected for discriminatory reasons, creating a mandatory, but legally rebuttable, presumption that the employer unlawfully discriminated.⁴⁶

Once the plaintiff has demonstrated a *prima facie* case of discrimination, “[t]he burden then . . . shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”⁴⁷ The employer’s burden is one of production only, not persuasion as in disparate impact claims.⁴⁸ This means the defendant must adduce evidence sufficient to allow the fact-finder to reasonably conclude that the employment decision was not motivated by discrimination.⁴⁹ If the jury believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, judgment must be in favor of the plaintiff.⁵⁰ However, if the employer has articulated a legitimate, nondiscriminatory reason, the plaintiff is afforded a fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the rejection were pretext,⁵¹ e.g., a cover-up for a racially discriminatory decision. Often, the plaintiff will attempt to present statistical evidence of discrimination to demonstrate pretext, as discussed in the next section.

3. Pattern-and-Practice

A third way of proving disparate treatment is by demonstrating a pattern-and-practice of discrimination. “When Title VII was enacted in 1964, it authorized private actions by individual employees and public actions by the Attorney General in cases involving a ‘pattern[-and-]practice’ of discrimination.”⁵² “In 1972, Congress amended Title VII to authorize the EEOC to

44. *Id.* at 802.

45. *Id.*

46. *Burdine*, 450 U.S. at 254.

47. *Green*, 411 U.S. at 802.

48. *Burdine*, 450 U.S. at 254.

49. *Id.*

50. *Id.*

51. *Id.* at 255–56.

52. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (quoting 42 U.S.C. § 2000e-6(a) (1994)).

bring its own enforcement actions” on behalf of the Attorney General.⁵³ “In 1991, Congress again amended Title VII to allow the recovery of compensatory and punitive damages by a ‘complaining party.’”⁵⁴ This “term includes both private plaintiffs and the EEOC.”⁵⁵ To bring a pattern-and-practice claim, most courts hold that the individual or agency bringing the suit must bring it as a class action. Some courts, however, hold that an individual plaintiff may bring a pattern-and-practice suit.

Under the Civil Rights Act of 1964,⁵⁶ a civil action may be brought if there is reasonable cause to believe that any person or group is engaged in a pattern-and-practice of discrimination.⁵⁷ When alleging that an employer’s policies exhibited a pattern-and-practice, the plaintiff must show that there was a system-wide pattern-and-practice to deny the plaintiff “the full enjoyment of Title VII rights.”⁵⁸ The plaintiff must “prove more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts.”⁵⁹

Senator Hubert Humphrey, during congressional debates on Section 707(a) of Title VII, explained the concept of pattern-and-practice:

a pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.

....

The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice. . . .⁶⁰

The plaintiff must establish by “preponderance of the evidence that . . . discrimination was the . . . standard operating procedure.”⁶¹

53. *Waffle House, Inc.*, 534 U.S. at 286 (citing *Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 325 (1980)); see also 42 U.S.C. § 2000e-6 (2000). For a discussion of the EEOC’s history, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 3–9 (1999).

54. *Waffle House, Inc.*, 534 U.S. at 287 (quoting 42 U.S.C. § 1981a (a)(1) (1994)).

55. *Id.*

56. § 706(a).

57. 42 U.S.C. § 2000e-6(a) (2000).

58. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

59. *Id.*

60. 110 CONG. REC. 14, 270 (1964).

A pattern-and-practice suit is divided into two phases: liability and remedy.⁶² During the liability stage, the plaintiff must prove a prima facie case of a policy, pattern, or practice of intentional discrimination against a protected group.⁶³ The prima facie case may be demonstrated either by statistical evidence aimed at establishing the defendant's past treatment of the protected group, or testimony from protected class members detailing specific instances of discrimination.⁶⁴ If the plaintiff satisfies this prima facie requirement, "[t]he burden [of production] then shifts to the employer to defeat [it] . . . by demonstrating that the . . . proof is either inaccurate or insignificant."⁶⁵ To challenge the plaintiff's proof, employers usually attack the source, accuracy, or probative force of the plaintiff's statistics.⁶⁶

Once the defendant introduces evidence satisfying its burden of production, the jury must then consider the evidence introduced by both sides to determine whether the plaintiffs have established by preponderance of the evidence that the defendant engaged in a pattern-and-practice of intentional discrimination.⁶⁷ If the jury finds that the plaintiff has proved a pattern-and-practice of discrimination, the case may move on to the remedial phase, depending on the remedy sought by the plaintiffs.

If injunctive relief is the only relief appropriate based on the evidence presented by both sides, an injunction should be awarded. This ends the inquiry and the case does not move on to the remedial phase.⁶⁸ On the other hand, if relief such as back pay, front pay, or compensatory recovery is requested in the pleadings' in addition to injunctive relief, the court must conduct the remedial phase of the trial.⁶⁹ The plaintiffs enter this second phase with a presumption "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."⁷⁰ This means that each plaintiff must now show only that she suffered an adverse employment decision and, therefore, was a potential victim of the proved class-wide discrimination.⁷¹ The burden of persuasion then shifts to the employer to demonstrate that the individual was subjected to the

61. *Teamsters*, 431 U.S. at 336.

62. *Id.* at 360–61.

63. *Id.* at 360.

64. *Id.* at 339.

65. *Id.* at 360.

66. *See Teamsters*, 431 U.S. at 340.

67. *See id.*

68. *Id.* at 361.

69. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1997).

70. *Id.* at 362.

71. *Id.* at 361–62.

adverse employment decision for lawful reasons.⁷² If the employer cannot meet this burden, the plaintiff is entitled to individualized relief.⁷³

In sum, a plaintiff attempting to prove disparate treatment is afforded three ways to prove discrimination. First, the plaintiff can present direct evidence including admissions by the employer or documents depicting discriminatory actions. Second, the plaintiff can use the *McDonnell Douglas* method of proof.⁷⁴ This test requires the plaintiff to demonstrate that the plaintiff belongs to a protected class, “was qualified for a job for which the employer was seeking applicants,” that the plaintiff was rejected, and that “after [plaintiff’s] rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff’s] qualifications.”⁷⁵ Third, the plaintiff can present evidence of a system-wide, pattern-and-practice of discrimination.

III. USING PATTERN-AND-PRACTICE TO SHIFT THE BURDEN IN INDIVIDUAL DISPARATE TREATMENT CASES

In class actions and actions brought by the EEOC, the burden of persuasion can be shifted to the employer by demonstrating a pattern-and-practice of discrimination by the employer.⁷⁶ Additionally, pattern-and-practice can be used to prove pretext in the third stage of the *McDonnell Douglas* method.⁷⁷ However, the circuits are split on whether pattern-and-practice can be used by an individual plaintiff to shift the burden to the employer in an individual claim of disparate treatment. Most circuits do not allow an individual plaintiff to shift the burden by demonstrating a pattern-and-practice, but a minority of circuits have recognized a plaintiff’s right to present such proof.

A. *Rationale Used by Courts That Do Not Allow Burden to Be Shifted*

The Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have held that pattern-and-practice cannot be used to shift the burden of proof in individual claims.⁷⁸ These courts focused on the fundamental differences between class

72. *Id.* at 362.

73. *Id.* at 361.

74. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

75. *Id.* at 802.

76. *Teamsters*, 431 U.S. at 360.

77. *Green*, 411 U.S. at 804–05.

78. *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355–56 (5th Cir. 2001); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760–61 (4th Cir. 1998); *Gilty v. Vill. of Oak Park*, 919 F.2d

actions and individual claims, and held that an inference of discrimination will not arise in an individual case until the plaintiff has proved all the elements of a *prima facie* case.⁷⁹ As a result of these differences, these courts held that the *McDonnell Douglas* method is better suited to prove individual disparate treatment claims.⁸⁰

In *Lowery v. Circuit City Stores, Inc.*,⁸¹ the Fourth Circuit held “that individuals do not have a private, non-class cause of action for pattern or practice discrimination under § 1981 or Title VII.”⁸² The plaintiffs, eleven African-American current and former employees of Circuit City, brought suit alleging that Circuit City had a “corporate culture of racial animus toward African-Americans” mainly because of a group of “white senior managers.”⁸³ The plaintiffs asserted that the

all-white management intentionally [demonstrated] racial animus . . . through discriminatory promotion policies and practices that included, among other things: (1) excessively subjective procedures and criteria used to deny opportunities for promotion to qualified African-Americans; (2) making the existence of job promotion vacancies known only through informal networks of white employees rather than through formal job posting procedures; (3) requiring African-American employees to satisfy more onerous requirements for promotion than those required for white employees; and (4) maintaining more onerous performance standards for African-American employees than for similarly situated white employees.⁸⁴

The district court entered judgment in favor of the employees on their claim that the employer engaged in a pattern-and-practice of discrimination.⁸⁵ Both the employer and employees appealed.⁸⁶

The Fourth Circuit framed the issue as “whether individuals have a private, non-class cause of action for pattern[-and-]practice discrimination and, thus, may . . . [use] . . . the *Teamsters* method of proof.”⁸⁷ The court concluded that “although such plaintiffs . . . [can] use evidence of a pattern[-and-]practice of discrimination to help prove claims of individual discrimination

1247, 1252 (7th Cir. 1990); *Craig v. Minn. State Univ. Bd.*, 731 F.2d 465, 469–70 (8th Cir. 1984).

79. See, e.g., *Lowery*, 158 F.3d at 760–61.

80. *Id.*

81. *Id.* at 742.

82. *Id.* at 759.

83. *Id.* at 749.

84. *Lowery*, 158 F.3d at 749.

85. *Id.* at 755–56.

86. *Id.* at 756–57.

87. *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998).

within the *McDonnell Douglas* framework, individual plaintiffs are not entitled to the benefit of the *Teamsters* method of proof.”⁸⁸ In reaching this conclusion, the Fourth Circuit noted that “[t]he Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination.”⁸⁹

The Fourth Circuit articulated two reasons why the pattern-and-practice framework is inapplicable to individual disparate treatment cases. First, the court held that the “manifest” and “crucial” differences between an individual’s claim of discrimination and class actions prevent an individual plaintiff from shifting the burden solely with evidence of a pattern-and-practice.⁹⁰ Second, the court stated that because the remedies sought in individual, non-class actions are different than the remedies sought in class actions, an individual plaintiff should not be allowed to shift the burden of proof through evidence of a pattern-and-practice.⁹¹

1. “Manifest” and “Crucial” Difference

Focusing on this “manifest” and “crucial” difference, the *Lowery* court noted that in class actions, “the plaintiffs first litigate the common question of fact, i.e., whether the employer utilized a pattern[-and-]practice which discriminated against the class.”⁹² Class actions are different from individual actions because in individual actions, common questions of fact are not litigated, but a specific instance of discrimination is the sole question that must be answered.⁹³ Thus, the fundamental difference is that in the individual, non-class actions, the main inquiry is a particular employment decision, whereas in class actions, the liability phase focuses not on individual decisions, but on the existence of a pattern of discriminatory conduct.⁹⁴ However, the Fourth Circuit stated that evidence of a pattern-and-practice can be a useful tool in demonstrating that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination, or that the employer’s articulated reasons for the adverse action was pretext.⁹⁵

88. *Id.* at 760–61.

89. *Id.* at 761.

90. *Id.* at 760–61.

91. *Id.* at 761.

92. *Lowery*, 158 F.3d at 761.

93. *Id.*

94. *Id.*

95. *Id.*

2. Difference in Remedies Sought

The *Lowery* court also focused on the difference in remedies sought in class actions and individual actions.⁹⁶ In class actions, plaintiffs “primarily seek to redress widespread discrimination.”⁹⁷ Accordingly, the Fourth Circuit concluded that the relief typically sought is injunctive and may include requiring the defendant to adopt affirmative action plans or altering a seniority system.⁹⁸ “On the other hand, in a private, non-class . . . [action], the plaintiff seeks to remedy individual harm” and seeks remedies such as back-pay, front-pay, reinstatement, hiring, or damages.⁹⁹ The difference between the two remedies is that the remedies sought in individual cases “require [an] examination of the circumstances surrounding a single employment action involving the plaintiff,” whereas the class action requires an examination of the entire class.¹⁰⁰

B. Rationale Used by Courts That Allow the Burden to Be Shifted

Although the Supreme Court has never explicitly held that pattern-and-practice can be used to prove a prima facie case and shift the burden to the defendant in private, non-class suits, the Eleventh and District of Columbia Circuits (“D.C. Circuits”) have allowed proof of pattern-and-practice to shift the burden.¹⁰¹ These courts borrow language from the leading Supreme Court cases allowing pattern-and-practice in class actions and apply this language to individual claims.

An example is the D.C. Circuit case of *Davis v. Califano*.¹⁰² In *Davis*, Dr. Barbara Davis, a white female employee, “alleged unlawful discrimination . . . based on her sex, in hiring, promotions, and other conditions of employment, in violation of Title VII.”¹⁰³ Dr. Davis provided statistical evidence showing that she was not promoted as quickly as other males with the same qualifications.¹⁰⁴ She presented data showing: 1) a “disparity in grade and salary structure between male and female employees;” 2) a “disparity in promotion rates of men and women employees;” and 3) a “disparity in grade

96. *Id.*

97. *Lowery*, 158 F.3d at 761.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986); *Davis v. Califano*, 613 F.2d 957, 961–62 (D.C. Cir. 1979).

102. 613 F.2d at 957.

103. *Id.* at 958.

104. *Id.* at 960.

and salary structure of male and female employees . . . with regard to their education.”¹⁰⁵ The district court dismissed the complaint, and Dr. Davis appealed.¹⁰⁶

The D.C. Circuit Court framed the issue as whether statistics alone could prove a *prima facie* case in an individual discrimination.¹⁰⁷ The D.C. Circuit Court, quoting the United States Supreme Court, stated that “statistical proof of a ‘broad-based policy of employment discrimination ‘provides’ reasonable grounds to infer that individual ‘employment’ decisions were made in pursuit of the discriminatory policy and . . . require ‘s’ the employer to come forth with evidence dispelling that inference.”¹⁰⁸ As a result, the D.C. Circuit Court concluded that equal force and effect must be given to the use of statistical evidence regardless of whether the case is brought as an individual, non-class action or as a class action.¹⁰⁹

The *Davis* court then adopted the same rationale adopted by the Supreme Court in *Teamsters* and applied it to individual, non-class actions.¹¹⁰ The D.C. Circuit Court found that the purpose of a *prima facie* case is to “create a greater likelihood that any single [employment] decision was a component of the overall pattern.”¹¹¹ It does not, nor is it expected to, “conclusively demonstrate that all of the employer’s decisions were part of the proved discriminatory pattern and practice.”¹¹² Proof of a pattern-and-practice of discrimination “creates a rebuttable presumption in favor of individual relief [which] is consistent with the manner in which presumptions are created generally.”¹¹³ “Moreover, the finding of a pattern[-and-]practice change[s] the position of the employer to that of a . . . wrongdoer [and] . . . the employer [is] in the best position to show why any individual employee was denied an employment opportunity.”¹¹⁴ The *Davis* court concluded that because proof of a pattern-and-practice of discrimination accomplishes the objective of the *prima facie* case, the *Teamsters* rationale should be applied to individual actions.¹¹⁵

105. *Id.*

106. *Id.* at 958.

107. *Davis*, 613 F.2d at 961.

108. *Id.* at 963 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 (1977)).

109. *Davis*, 613 F.2d at 963.

110. *Id.*

111. *Id.* (quoting *Teamsters*, 431 U.S. at 359 n.45).

112. *Teamsters*, 431 U.S. at 359 n.45.

113. *Id.*

114. *Davis v. Califano*, 613 F.2d 957, 963 (D.C. Cir. 1979) (quoting *Teamsters*, 431 U.S. 359 n.45).

115. *Id.*

IV. ANALYSIS OF THE METHODS

There are three reasons why individual plaintiffs in Title VII actions for disparate treatment should be able to shift the burden of production by demonstrating the defendant had a pattern-and-practice of discrimination. First, allowing individuals to use the *Teamsters* approach is consistent with existing case precedent. Second, use of pattern-and-practice by individuals is effective proof of discrimination in individual, non-class actions. Third, the *Teamsters* approach promotes the anti-discrimination policy of Title VII.

A. Consistent With Case Precedent

The first reason why plaintiffs should be afforded the right to shift the burden of proof by using evidence of a pattern-and-practice of discrimination is that it is consistent with past case law. In *Teamsters*, the Supreme Court acknowledged that past cases have made it “unmistakably clear that ‘statistical [evidence has] served . . . an important role’ . . . in which the existence of discrimination is a disputed issue”¹¹⁶ and is “competent in proving employment discrimination [cases].”¹¹⁷ Furthermore, “[i]n many cases the only available avenue of proof is the use of . . . statistics to uncover clandestine and covert discrimination by the employer.”¹¹⁸ In a footnote, the Supreme Court explained that, “absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.”¹¹⁹ “Statistics showing [a distinct] racial . . . imbalance . . . [provide] a telltale sign of purposeful discrimination.”¹²⁰

Case law has supported the fact that the significance of the *McDonnell Douglas* method does not lie in its “specification of the discrete elements” required to prove a prima facie case.¹²¹ *McDonnell Douglas* indicates “that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a

116. *Teamsters*, 431 U.S. at 339 (quoting *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 620 (1974)).

117. *Id.*

118. *Id.* at 340 n.20 (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971)); see also *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972).

119. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977).

120. *Id.*

121. *Id.* at 358.

discriminatory criterion illegal under the Act.”¹²² Thus, “[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence,”¹²³ as long as the evidence creates an inference of discrimination. As stated in *Teamsters*, statistics can “create a greater likelihood that any single decision was a component of the overall pattern”¹²⁴ and are a “telltale sign of purposeful discrimination.”¹²⁵ Furthermore, “proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief [which] is consistent with the manner in which presumptions are [normally] created.”¹²⁶ As a result, the plaintiff should not be denied the ability to demonstrate a *prima facie* case solely through evidence of a pattern-and-practice.

B. *Pattern-and-Practice Does Work in Individual, Non-Class Actions*

The second reason why individual plaintiffs should be afforded an opportunity to use the *Teamsters* approach is because it is suitable to be used in individual, non-class actions. In *Lowery*, the Fourth Circuit stated “that there is a ‘manifest’ . . . difference between an individual’s claim of discrimination and a class action alleging a general pattern[-and-]practice of discrimination.”¹²⁷ The court determined that in a non-class action, the question of whether the employer discriminated against the plaintiff in one particular instance is litigated, whereas in a class action, the question of whether a discriminatory policy existed is litigated.¹²⁸ Therefore, proof of a pattern-and-practice answers the question of discrimination in the workplace, but not for that individual plaintiff. Although this difference is clear, it does not justify prohibiting individual plaintiffs from using evidence of a pattern-and-practice to shift the burden, for three reasons.

First, the two-phase trial created by the Supreme Court in *Teamsters* defeats this theory.¹²⁹ During the first stage, the plaintiff demonstrates that “the employer has followed an employment policy of unlawful discrimination.”¹³⁰ If the employer cannot rebut this evidence by clear and convincing evidence, liability is established and the case moves on to the remedial phase.¹³¹ Dur-

122. *Id.*

123. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

124. *Teamsters*, 431 U.S. at 359 n.45.

125. *Id.* at 340 n.20.

126. *Id.* at 359 n.45.

127. *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998) (citing *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

128. *Id.*

129. *Teamsters*, 431 U.S. at 360–61.

130. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

131. *Id.*

ing the remedial phase, the plaintiff proves that he was, in fact, discriminated against.¹³²

Second, to shift the burden, the plaintiff must show that discrimination more likely than not played a role in the employment decision affecting the plaintiff.¹³³ Evidence demonstrating a pattern-and-practice of discrimination throughout the company or corporation adequately meets this burden.¹³⁴ Evidence of a pattern-and-practice creates the likelihood that any single decision was in furtherance of the discriminatory policy.¹³⁵ Once this is shown, the employer becomes a wrongdoer and is in the best position to demonstrate that the employment actions were taken for legitimate reasons.¹³⁶

Third, the evidentiary value of demonstrating a pattern-and-practice of discrimination should not be, and is not, any less valuable because there are not multiple parties. Regardless of whether or not evidence of a pattern-and-practice is brought in an individual, non-class action, or in a class action, its importance in proving discrimination is the same.

C. Promotes Anti-Discrimination Policy of Title VII

The third reason why individual plaintiffs should be afforded the *Teamsters* approach is that it promotes the anti-discrimination policy and goals of Title VII.¹³⁷ “The primary purpose of Title VII [is] ‘to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices. . . .’”¹³⁸ Under Title VII, practices and procedures “‘cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.’”¹³⁹ Unfortunately, by only affording an individual plaintiff the use of the *McDonnell Douglas* approach, employers get away with intentional discrimination.¹⁴⁰

Forcing the plaintiff to prove discrimination through the *McDonnell Douglas* method presents the employer with an advantage.¹⁴¹ *McDonnell Douglas* works well for a plaintiff with strong circumstantial evidence that the employer has discriminated against the particular plaintiff.¹⁴² However,

132. *Id.*

133. *Id.* at 359 n.45.

134. *Id.*

135. *Teamsters*, 431 U.S. at 359 n.45.

136. *Id.*

137. *Id.* at 348.

138. *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

139. *Id.* at 358 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

140. *See Green*, 411 U.S. at 802–03.

141. *See id.*

142. *Id.*

problems with *McDonnell Douglas* arise when the plaintiff has overwhelming evidence that the employer has a broad pattern of discrimination, but no evidence that the particular plaintiff was discriminated against.¹⁴³ In this situation, the burden should be on the employer to demonstrate that it did not discriminate against the individual plaintiff. By affording the plaintiff the option of shifting the burden through evidence of a pattern-and-practice of discrimination, the purpose of Title VII will be met.

Past cases have demonstrated the difficulties plaintiffs have when they have strong statistical evidence, but not enough evidence to prove a prima facie case under *McDonnell Douglas*.¹⁴⁴ In *Victory v. Hewlett-Packard Co.*,¹⁴⁵ the plaintiffs' suit for gender discrimination was dismissed for failure to demonstrate a prima facie case of discrimination, despite the fact that the plaintiff submitted evidence of a pattern-and-practice of discrimination.¹⁴⁶ In that case, plaintiff alleged that the employer "paid her less than comparably trained and qualified men, failed to promote her to management positions for which she was qualified, and failed to equalize the terms and conditions of her employment."¹⁴⁷ Convincing statistical evidence was presented to demonstrate her claim.¹⁴⁸ First, between the years of 1986 and 1989, twelve male sales representatives were promoted out of a pool of ninety-five male sales representatives.¹⁴⁹ On the other hand, during this same time frame, out of the twenty-five female sales representatives, not a single female was promoted.¹⁵⁰ The statistical expert explained that there was a "one in twenty chance that this outcome could have occurred randomly . . . [and that] 'there is no explanation for the fact that women received lower promotion rating than men.'"¹⁵¹ Furthermore, a review of salaries showed that women received around \$7500 per year less than comparably trained and qualified men.¹⁵²

In dismissing plaintiff's claim, the United States District Court for the Eastern District of New York found several problems with the prima facie case presented by the plaintiff.¹⁵³ First, the "plaintiff never applied for a spe-

143. *Id.*

144. *Id.*

145. 34 F. Supp. 2d 809 (E.D.N.Y. 1999).

146. *Id.* at 821.

147. *Id.* at 813.

148. *Id.* at 815.

149. *Id.*

150. *Victory*, 34 F. Supp. 2d at 815.

151. *Id.*

152. *Id.*

153. *Id.* at 818-19.

cific position.”¹⁵⁴ Although this was true, “Hewlett-Packard did not have a uniform practice of posting openings for management positions or a standardized written application procedure.”¹⁵⁵ However, the plaintiff had informed her district managers on several occasions of her interest in obtaining a management position.¹⁵⁶ Second, the “[p]laintiff failed to articulate a specific promotion for which she was denied.”¹⁵⁷

Victory demonstrates the problems a plaintiff has with the *McDonnell Douglas* approach.¹⁵⁸ Although the plaintiff did not have clear-cut evidence that she was discriminated against, she did present evidence sufficient to show that there was a great likelihood that she was discriminated against.¹⁵⁹ It is in this type of case where the *Teamsters* approach would be advantageous to the plaintiff. The Supreme Court has acknowledged that evidence of a pattern-and-practice is important evidence.¹⁶⁰ Evidence of this type changes the position of the employer to that of a proved wrongdoer and forces the employer to demonstrate by clear and convincing evidence that the employment action was made for legitimate reasons.¹⁶¹ The *Teamsters* approach solves the problem of dismissing cases where there is clear evidence of discrimination, but not enough to prove the *prima facie* case.¹⁶² Additionally, affording this method to individuals is consistent with Title VII’s purpose of eliminating all discriminatory policies.

V. RECOMMENDATION

By adopting the use of pattern-and-practice in individual, non-class actions to prove discrimination, plaintiffs will be afforded multiple options in proving discrimination in violation of Title VII. Although the Supreme Court has never specifically held that individuals can use evidence of a pattern-and-practice of discrimination to shift the burden, past Supreme Court decisions make it clear that the *McDonnell Douglas* method was not meant to be the sole method of proving discrimination for an individual.¹⁶³

154. *Id.* at 819.

155. *Victory*, 34 F. Supp. 2d at 819.

156. *Id.*

157. *Id.*

158. *See id.* at 816–17.

159. *Id.* at 815–16.

160. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

161. *Id.* at 359–61.

162. *Id.*

163. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In *Teamsters*, the Defendants argued that the *McDonnell Douglas* pattern of proof was the only means of establishing a prima facie case of individual discrimination.¹⁶⁴ The Court responded by stating that:

[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.¹⁶⁵

Furthermore, the Supreme Court also stated in *United States Postal Service Board of Governors v. Aikens*,¹⁶⁶ that a “plaintiff may prove his case by direct or circumstantial evidence.”¹⁶⁷ These statements by the Supreme Court indicate that there is more than just one method by which the plaintiff may shift the burden to the defendant.¹⁶⁸ These statements also demonstrate that one of the rationales behind not allowing pattern-and-practice to be used by individual plaintiffs, which the Supreme Court has never officially allowed, is without merit.¹⁶⁹

As noted above, the *Teamsters* approach can be applied to individuals.¹⁷⁰ Courts should permit individual plaintiffs to demonstrate that adverse employment decisions were part of a discriminatory policy followed by the employer. Proof of a discriminatory policy may not be enough to prove that the individual plaintiff was discriminated against, but it does provide strong evidence and “create[s] a greater likelihood that any single decision” by the employer was based on that policy.¹⁷¹ The Supreme Court has stated that “proof of the pattern[-and-]practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy.”¹⁷²

Once a pattern-and-practice is established, the burden shifts to the employer to prove by clear and convincing evidence that the plaintiff’s proof is inaccurate or insignificant.¹⁷³ If the employer cannot meet this burden, the

164. *Teamsters*, 431 U.S. at 358.

165. *Id.*

166. 460 U.S. 711 (1983).

167. *Id.* at 714 n.3.

168. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

169. *Id.*

170. *Teamsters*, 431 U.S. at 328.

171. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977).

172. *Id.* at 362.

173. *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1287 n.22 (11th Cir. 2000) (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986)); *Teamsters*, 431 U.S. at 362.

jury may conclude that a violation has occurred.¹⁷⁴ At this point, the case moves onto the liability phase.¹⁷⁵ During this phase, the plaintiff must demonstrate that she “was a potential victim of the proved discrimination.”¹⁷⁶

The concerns over the differences of proof between class actions and individual, non-class action lawsuits are solved at the liability phase. During this phase, the individual plaintiff demonstrates that he or she was in fact discriminated against in a specific instance.¹⁷⁷ The proof of an overall policy of discrimination is merely used to get to this point and to demonstrate that the employer has a history of discrimination.¹⁷⁸

VI. CONCLUSION

The Supreme Court has stated that the *McDonnell Douglas* pattern of proof is not the sole method of proof available to individual plaintiffs. As a result, plaintiffs should be afforded the option of demonstrating discrimination through the use of pattern-and-practice as set out by the Court in *Teamsters*.¹⁷⁹ This approach offers three important advantages to an individual plaintiff. First, the plaintiff can avoid the rigid and sometimes unfair *McDonnell Douglas* approach. The pattern-and-practice approach allows the plaintiff-employee, who has evidence that the employer discriminated, but no evidence that the employer discriminated against that particular plaintiff-employee, to shift the burden of proof. Unfortunately, under the *McDonnell Douglas* approach, the plaintiff's claim would be dismissed. Second, the two-phase pattern-and-practice trial shifts the burden of persuasion to the employer, which is entirely appropriate since the plaintiff already has proven that the employer engaged in systematic intentional discrimination. Third, in cases where cladstone proof of discrimination is not available, proof of a pattern-and-practice of discrimination can provide the plaintiff with a presumption of discrimination. As a result of these important advantages to the plaintiff, plaintiffs should be afforded the right to use proof of a pattern-and-practice of discrimination to shift the burden in individual, non-class actions.

174. *Teamsters*, 431 U.S. at 361.

175. *Id.*

176. *Id.* at 362.

177. *Id.* at 361.

178. *Id.*

179. 431 U.S. 324 (1977).

THE EXTRATERRITORIAL APPLICATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT: STATE APPELLATE CASES ADDRESSING THE ISSUE

JENNIFER C. ERDELYI*

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I. INTRODUCTION

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") is a consumer protection law based upon the Federal Trade Commission Act.¹ It is designed to govern consumer protection by prohibiting "unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."² It is used by the Office of the State Attorney and the Department of Legal Affairs to prosecute violators, and it also provides a private cause of action to individuals and businesses.³ This Act does not contain express language restricting its protection to Florida residents only.⁴ Courts in Florida, both federal and state, have addressed matters involving the application of the FDUTPA to out-of-state and even international parties.⁵ The issue of the use of the FDUTPA by non-residents of the state has not been consistently settled as of today and in fact, a recent decision by the Fourth District Court of Appeal may have further complicated the matter.⁶

The extraterritorial use of this law is an important issue for individuals and businesses that reside in and out of the State of Florida. The amount of international and interstate trade that is performed in and involves Florida makes it important to highlight the history and current status of court opin-

1. 15 U.S.C. § 45 (2000); FLA. STAT. § 501.201-.213 (2002); David J. Federbush, *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act*, 73 FLA. B.J. 26, 28 (1999) [hereinafter Federbush I].

2. § 501.202(2).

3. § 501.203(2), .211(1). The Department of Legal Affairs is headed-up by the Attorney General of the State of Florida. § 20.11.

4. See § 501.201-.213.

5. See, e.g., *Guyana Tel. & Tel. Co. v. Melbourne Int'l Communications, Ltd.*, 329 F.3d 1241, 1243 (11th Cir. 2003); *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1128-29 (11th Cir. 1999); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1093 (Fla. 4th Dist. Ct. App. 2003); *Millennium Communications & Fulfillment, Inc. v. Dep't of Legal Affairs*, 761 So. 2d 1256, 1257 (Fla. 3d Dist. Ct. App. 2000); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 437 (Fla. 4th Dist. Ct. App. 1999); *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999).

6. See *Hutson*, 837 So. 2d at 1093-94 (explaining the court's decision in *Glassman* four years earlier).

ions to determine the effective scope of the Florida Deceptive and Unfair Trade Practices Act.

This article provides a summary of the Act by describing its purposes, types of violations, enforcement power, and available remedies. The pertinent state appellate case history is then explored, including a discussion of two Fourth District Court of Appeal cases, which examine why the court held it was appropriate for the Act to extend to non-residents of Florida in one case, while not in the other.⁷ The court's rationale in each case, and an analysis of factors to be considered in determining if the FDUTPA would apply in future cases, is analyzed.

II. OVERVIEW OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

A. *Purposes of the Act*

As its name suggests, the Florida Deceptive and Unfair Trade Practices Act is a Florida Statute intended to provide a means of protection against unfair, deceptive, and unconscionable trade practices.⁸ Specifically, the law states its purposes as:

(1) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices. (2) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. (3) To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.⁹

By its definition under the FDUTPA, “[c]onsumer’ means an individual; child, by and through its parent or legal guardian; business; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; any commercial entity, however denominated; or any other group or combination.”¹⁰ Thus, through its definition of “consumer”

7. *Id.* at 1094 (distinguishing the facts of this case from those in *Glassman* in support of the court's determination that the FDUTPA should not apply to all claims in a national class action).

8. § 501.202(1)-(3).

9. *Id.*

10. § 501.203(7).

which includes business entities, and by its stated goal of shielding business enterprises from unfair competition, this statute extends beyond the protection of the mere individual consumer and into the area of civil antitrust as well.¹¹

B. *Violations of the FDUTPA*

The FDUTPA is known as a “little FTC act” because it is the State of Florida’s version of the Federal Trade Commission Act (“FTC Act”).¹² As such, the Florida Legislature intended that “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts” in determining the types of conduct that constitute violations of the FDUTPA.¹³ On its face, the statute prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹⁴ The Supreme Court of Florida upheld the constitutionality of the FDUTPA, despite its lack of specificity as to the types of conduct that are considered to be violations, in *Department of Legal Affairs v. Rogers*.¹⁵

The statute allows for, but does not require, the adoption of rules that specify violating practices by the Department of Legal Affairs.¹⁶ All substantive rules created by the Department of Legal Affairs must be consistent with those created by the FTC and the federal courts in their interpretations of the FTC Act.¹⁷ Supplementing the holding in *Rogers*, the Fourth District Court of Appeal held in *Department of Legal Affairs v. Father & Son Moving & Storage, Inc.*¹⁸ that “a specific rule or regulation is not necessary to the determination of what constitutes an unfair or deceptive practice.”¹⁹ Subsequent to the decision in *Father & Son*, the Department of Legal Affairs repealed rules that it had previously adopted and cited this case as the justification for its repeal.²⁰

11. *Id.*; § 501.202(2); see David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLA. B.J. 52, 53 (2002) [hereinafter Federbush II].

12. Federbush I, *supra* note 1; 15 U.S.C. § 45 (2000).

13. FLA. STAT. § 501.204(2) (2003).

14. § 501.204(1).

15. 329 So. 2d 257, 267 (Fla. 1976).

16. §§ 501.203(4), .205(1).

17. § 501.205(2).

18. 643 So. 2d 22 (Fla. 4th Dist. Ct. App. 1994).

19. *Id.* at 24.

20. FLA. ADMIN. CODE ANN. R. 2-2.001 (2000) (stating “[i]t is neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by Part II,

While the FDUTPA does not contain a list of practices that are considered to be violations, it does provide some broad guidelines in its definitions:

“Violation of this part” means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2001: (a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.; (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.²¹

The last category of “per se violations” potentially provides wide latitude as a basis for FDUTPA violations, because the statutes, rules, or ordinances breached do not need to contain definite references to the FDUTPA, but rather, need only prohibit conduct that is deceptive, unfair, or unconscionable.²² The type of practices that the FDUTPA seeks to regulate are also quite broad, as demonstrated by its definition:

“Trade or commerce” means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise of *any* good or service, or *any* property, whether tangible or intangible, or *any* other article, commodity, or thing of value, *wherever situated*. “Trade or commerce” shall include the conduct of *any* trade or commerce, however denominated, including *any* nonprofit or not-for-profit person or activity.²³

Judging by the language used on its face, the intended scope of the FDUTPA is therefore far-reaching.²⁴

C. Enforcement of the FDUTPA and Allowable Remedies

The Office of the State Attorney and the Department of Legal Affairs have power to uphold the FDUTPA.²⁵ The statute reads:

Chapter 501, Florida Statutes.” (citation omitted)). The *Florida Administrative Code Annotated* also states that the repeal does not modify or restrict the application of Chapter 501 of the *Florida Statutes*, to deceptive and unfair trade practices. *Id.*

21. § 501.203(3)(a)-(c).

22. Mark S. Fistos, *Per Se Violations of the Florida Deceptive and Unfair Trade Practices Act*, 76 FLA. B.J. 62, 63–64 (2002).

23. § 501.203(8) (emphasis added).

24. *See id.*

“[e]nforcing authority” means the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office’s jurisdiction. “Enforcing authority” means the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.²⁶

The “enforcing authority” can bring an action against a willful violator of the Act for a civil penalty of up to \$10,000, and may also seek a declaratory judgment, enjoin a violator, or pursue actual damages on behalf of consumers or governmental entities.²⁷

A private cause of action is also provided for by the Act.²⁸ The FDUTPA states “*anyone aggrieved* by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.”²⁹ Additionally, “[i]n any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney’s fees and court costs.”³⁰ The relaxed threshold of “anyone aggrieved” allows for the use of the FDUTPA by business entities for unfair, deceptive, or unconscionable practices of competitors.³¹

III. EXTRATERRITORIAL APPLICATION IN PERTINENT CASES

One aspect of the Florida Deceptive and Unfair Trade Practices Act that has been debated in the courts is the issue of its extraterritorial application.³² The FDUTPA does not contain express language limiting its reach within the

25. § 501.203(2).

26. *Id.*

27. § 501.2075; § 501.207(1)(a)-(c).

28. § 501.211(1).

29. *Id.* (emphasis added).

30. § 501.211(2).

31. *See* § 501.211(1); *Federbush II*, *supra* note 11, at 52.

32. *See, e.g.,* *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1091 (Fla. 4th Dist. Ct. App. 2003); *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1260 (Fla. 3d Dist. Ct. App. 2000); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 437 (Fla. 4th Dist. Ct. App. 1999); *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999).

State of Florida, as opposed to the Florida Antitrust Act, for example.³³ There are various scenarios in which the FDUTPA could potentially apply, for example: an out-of-state plaintiff (alleged victim) versus an in-state defendant (alleged violator), or an in-state plaintiff (alleged victim) versus an out-of-state defendant (alleged violator).³⁴ The situation becomes more complicated when there are plaintiffs from both within and outside the state, as well as when the violative conduct occurs solely within the state or both within and outside the state.³⁵ Court decisions have swayed back and forth between allowing the application of the FDUTPA to cases involving out-of-state parties and not doing so, because of the need for other states' consumer protection laws to govern instead.³⁶ A careful review of relevant cases may shed some light on the factors that the courts have considered when determining whether or not to allow the application of the FDUTPA to litigation involving non-resident parties. This Note reviews relevant appellate level cases that decided the issue of whether the FDUTPA may be used as the basis of a cause of action by non-resident plaintiffs.

A. *FDUTPA Not Applied Extraterritorially in Coastal Physician Services of Broward County, Inc. v. Ortiz*

The 1999 case of *Coastal Physician Services of Broward County, Inc. v. Ortiz*³⁷ involved a claim by a patient against a physician staffing service for alleged violations of the FDUTPA incurred in the collection of medical bills.³⁸ A discovery order was entered by the circuit court, instructing the physician staffing service to provide documents naming all people to whom the service sent a certain form bill.³⁹ The staffing service petitioned for a writ of certiorari, arguing that the information they were required to provide

33. Federbush II, *supra* note 11, at 60. Compare § 501.201-.213, with § 542.18 (stating "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful.") (emphasis added);.

34. See, e.g., *Fendrich v. RBF, L.L.C.*, 842 So. 2d 1076, 1079 n.2 (Fla. 4th Dist. Ct. App. 2003) (out-of-state plaintiffs v. in-state defendants); *Execu-Tech Bus. Sys. Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 583 (Fla. 2000) (in-state-plaintiffs v. out-of-state defendants).

35. See, e.g., *Hutson*, 837 So. 2d at 1094; *Glassman*, 738 So. 2d at 437.

36. Compare *Hutson*, 837 So. 2d at 1094 (holding that class certification in Florida was not appropriate because the alleged wrong took place in all fifty states and therefore, Florida law would not apply to all claims), with *Glassman*, 738 So. 2d at 439 (finding that although a majority of plaintiffs were not residents of Florida, the FDUTPA applied to all members of the class).

37. 764 So. 2d 7 (Fla. 4th Dist. Ct. App. 1999).

38. *Id.* at 8.

39. *Id.*

under the discovery request should be limited to Florida residents only.⁴⁰ Their initial attempt to limit discovery was unsuccessful; however, on motion for rehearing, the Fourth District Court of Appeal granted Coastal's petition for certiorari of the discovery order, limited to the names of those recipients outside the State of Florida.⁴¹ In granting certiorari, the court agreed with the staffing service that non-Florida residents could not make claims under the Florida Deceptive and Unfair Trade Practices Act.⁴² The court concluded that together with another state law at issue, the FDUTPA is "for the protection of in-state consumers from either in-state or out-of-state debt collectors. Other states can protect their own residents, as Florida itself does with regard to out-of-state collectors."⁴³

In *Ortiz*, the Fourth District Court of Appeal was therefore quite limiting in its determination of who can utilize the Florida Deceptive and Unfair Trade Practices Act, holding that non-residents of the state were not entitled to benefit from its protections, but rather, must rely on the laws of their respective states.⁴⁴ The court's holding may, or may not, still stand, as shall be discussed below.⁴⁵

B. *FDUTPA Applied in Renaissance Cruises, Inc. v. Glassman*

The next relevant case at the state appellate level was *Renaissance Cruises, Inc. v. Glassman*,⁴⁶ also decided in 1999.⁴⁷ Here, the Fourth District Court of Appeal upheld a class certification by travelers against a cruise line for claims of deceptive trade practices under the FDUTPA, even though many class members were not residents of Florida.⁴⁸ The conduct in question was the collection by the cruise line of a "port charge" which was supplemental to the cost of the cruise itself.⁴⁹ The alleged deceptive conduct was the representation by the cruise line that the entire port charges were

40. *Id.*

41. *Id.*

42. *Ortiz*, 764 So. 2d at 8.

43. *Id.* (citations omitted).

44. *See id.*

45. *Compare* Millennium Communications & Fulfillment, Inc. v. Dep't of Legal Affairs, 761 So. 2d 1256, 1262 (Fla. 3d Dist. Ct. App. 2000) (characterizing the subsequent Fourth District Court of Appeal decision in *Glassman* as a rescission of its previous holding in *Ortiz*), with *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. 4th Dist. Ct. App. 2003) (clarifying that its holding in *Ortiz* was not superceded by its holding in *Glassman*, but rather, both opinions stand and the cases are distinguishable).

46. 738 So. 2d 436 (Fla. 4th Dist. Ct. App. 1999).

47. *Id.*

48. *See id.* at 439.

49. *Id.* at 437.

paid to the ports, when actually an amount less than that collected was paid out and the cruise line kept the difference.⁵⁰ The plaintiffs commenced an action for what they deemed to be a deceptive trade practice and sought class certification of “[a]ll U.S. residents who traveled upon any vessel owned or operated by Renaissance on or after April 22, 1992, and paid port charges to Renaissance in connection with such cruise.”⁵¹

1. Requirements for Certification of the Class

In order to certify a class, it must meet the requirements of rule 1.220(a) of the *Florida Rules of Civil Procedure*, which reads:

(1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.⁵²

In addition to meeting those elements, a claim can only be maintained on behalf of the class if,

individual adjudications for proposed class members would be inconsistent; or the defendant’s actions make injunctive or declaratory relief as a whole appropriate; or the common questions of law or fact “predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.”⁵³

2. Application of Florida Law to All Members of the Class

In *Glassman*, based on data provided by the cruise line, ninety-two percent of tickets were sold to non-residents of the State of Florida.⁵⁴ The cruise line argued against class certification on the basis of the inapplicability of

50. *Id.*

51. *Id.*

52. FLA. R. CIV. P. 1.220(a); *Glassman*, 738 So. 2d at 438.

53. *Glassman*, 738 So. 2d at 438 (quoting FLA. R. CIV. P. 1.220(b)).

54. *Id.* at 437.

Florida law to every proposed class member, as so many were non-residents of Florida who purchased their tickets outside of the state.⁵⁵ If Florida law did not pertain to their claims, then the “commonality” and “predominance” requirements of rules 1.220(a)(2) and (b)(3) would not be met and the class could not be certified.⁵⁶

The travelers, however, demonstrated that while not in the majority, still over 6000 potential class members were residents of the State of Florida.⁵⁷ Numerous other factors helped to establish that the use of Florida law for all claims would be proper: the location of Renaissance’s principal place of business and site of most of its business operations being in Florida; the traveler’s ultimate payment being made to the cruise line in Florida; and a forum selection clause in the terms of each cruise ticket, specifying Broward County, Florida as having jurisdiction over claims arising out of the ticket sale.⁵⁸

Here on appeal, the “significant contact or significant aggregation of contacts” test developed in *Phillips Petroleum Co. v. Shutts*⁵⁹ was relied upon by the cruise line as the standard that needed to be met in order “to apply a state’s substantive law to a class action without offending the Due Process or Full Faith and Credit Clauses.”⁶⁰ The cruise line contended that “there were insufficient contacts with Florida to warrant application of Florida law to apply to the entire class so that common questions of law and fact would not predominate over individual claims.”⁶¹ For the reasons mentioned above that were asserted by the travelers, and other reasons as well, the Fourth District Court of Appeal found that there were significant contacts with the State of Florida to warrant the application of its law to claims by the class members,

55. *Id.*

56. *Renaissance Cruise, Inc. v. Glassman*, 738 So. 2d 436, 437 (Fla. 4th Dist. Ct. App. 1999); FLA. R. CIV. P. 1.220(a)(2), (b)(3).

57. *Glassman*, 738 So. 2d at 437.

58. *Id.* at 438. While the claim under the FDUTPA that was asserted by the class did not arise under the ticket sale transaction, the presence of the forum selection clause was argued by the potential class members to be additional justification for applying Florida law, since the cruise line had chosen to avail itself of the jurisdiction for those disputes which did originate under the ticket transaction, and so should be held for this action. *Id.*

59. 472 U.S. 797, 818 (1985).

60. *Glassman*, 738 So. 2d at 439 (referencing *Shutts*, 472 U.S. at 818–19). The Court in *Shutts* quoted its plurality opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Shutts*, 472 U.S. at 818; *Hague*, 449 U.S. at 312–13.

61. *Glassman*, 738 So. 2d at 438–39 (citing *Shutts*, 472 U.S. at 818–19).

so “[t]here [was] nothing arbitrary nor fundamentally unfair in applying the law of Florida to all of the members of the class.”⁶²

The cruise line asserted two other reasons that class certification was not proper: based on Florida choice of law standards, Florida substantive law would not apply; and the statute of limitations varied between states and thus, it would be unmanageable to apply to individual class members.⁶³ These claims were both denied by the court, which found that the significant relationship test to determine which state’s substantive law applies.⁶⁴ The test, as outlined in *Bishop v. Florida Specialty Paint Co.*,⁶⁵ was met here and so Florida substantive law applies to all claims.⁶⁶ With respect to the varying statutes of limitation issue, the court cited *Bates v. Cook, Inc.*,⁶⁷ in which the significant relationship test in *Bishop* was used to determine which state’s statute of limitation applies, and since here that test allowed for the use of Florida substantive law, Florida’s statute of limitation would apply to all class members as well.⁶⁸

One note that becomes important in the later discussion of the *Hutson* case,⁶⁹ is that in *Glassman*, the Fourth District Court of Appeal mentioned in its account of the trial court’s opinion that the common injury occurred in Florida because all cruise payments were made to the cruise line in Florida.⁷⁰ There was no further discussion of this determination in the Fourth District Court of Appeal’s opinion as it was not specifically an issue raised by *Glassman* on appeal.⁷¹ In *Hutson*, the court refers to the place of injury as a determining factor as to whether the FDUTPA applies to a class action involving non-residents of Florida.⁷²

62. *Id.* at 439. Other factors that the court considered in determining that there were significant contacts between Florida and the litigation included: the port charges in question were paid by the cruise line by checks issued from Fort Lauderdale; overages above the port charges paid out were kept by the cruise line in Fort Lauderdale; the cruise ticket contract and marketing material were from Broward County, and included the cruise line’s Fort Lauderdale address. *Id.*

63. *Renaissance Cruise, Inc. v. Glassman*, 738 So. 2d 436, 439–40 (Fla. 4th Dist. Ct. App. 1999).

64. *Id.* at 439.

65. 389 So. 2d 999, 1001 (Fla. 1980).

66. *Glassman*, 738 So. 2d at 439.

67. 509 So. 2d 1112, 1114–15 (Fla. 1987).

68. *Glassman*, 738 So. 2d at 440.

69. *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090 (Fla. 4th Dist. Ct. App. 2003).

70. *Id.* at 438.

71. *See id.* at 436–40.

72. *See Hutson*, 837 So. 2d at 1094.

3. Conclusion: Application of the FDUTPA to Non-Resident Class Members

In *Glassman*, the Fourth District Court of Appeal affirmed the Seventeenth Judicial Circuit Court's "well-reasoned order."⁷³ In granting the class certification, the trial court

concluded that there was sufficient commonality of factual and legal issues and that Florida had sufficient contacts, creating state interest, such that application of Florida law to the entire class was not arbitrary or unfair. The court noted that Florida has a great interest in protecting *people dealing with corporations doing business within Florida*.⁷⁴

The affirmation by the Fourth District Court of Appeal of the lower court's holding, emphasizing the State of Florida's interest in protecting people dealing with Florida businesses, demonstrates a shift in the court's approach to the use of the FDUTPA from that expressed in *Ortiz*.⁷⁵ There, the court characterized the purpose of the Act as being "for the protection of in-state consumers" in granting certiorari to limit discovery to only residents of the state because non-residents were not entitled to make claims under the FDUTPA.⁷⁶ Here, the state's interest in "protecting people dealing with corporations doing business within Florida" was applicable to the entire class, Florida residents and non-residents alike, and their claims under the Florida Deceptive and Unfair Trade Practices Act were permitted.⁷⁷

C. *FDUTPA Not Applied Extraterritorially in Océ Printing Systems USA, Inc. v. Mailers Data Services, Inc.*⁷⁸

The Second District Court of Appeal decided *Océ* in June of 2000.⁷⁹ This case was brought by a group of users, brokers, and servicers of high speed printers against the company that manufactured, sold, and financed the

73. *Glassman*, 738 So. 2d at 437.

74. *Renaissance Cruise, Inc. v. Glassman*, 738 So. 2d 436, 438 (Fla. 4th Dist. Ct. App. 1999) (describing the 17th Circuit Court's holding of class certification and the application of Florida law to all claims) (emphasis added).

75. *See id.* at 437-38. *But see* *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999).

76. *Ortiz*, 764 So. 2d at 8.

77. *Glassman*, 738 So. 2d at 438.

78. 760 So. 2d 1037 (Fla. 2d Dist. Ct. App. 2000).

79. *Id.*

printers.⁸⁰ The complaint alleged violations of both the FDUTPA and the Florida Antitrust Act for conduct by the defendants involving their maintenance service, replacement parts, and lease financing.⁸¹ The plaintiffs sought nationwide class certification, which was granted by the lower court and appealed here.⁸²

In determining whether the FDUTPA would apply to the claims of non-residents, the Second District Court of Appeal acknowledged the lack of limiting language in the Act itself, but limited the use of the statute to Florida residents nonetheless.⁸³ The sole authority that the court cited for justification of its decision was *Coastal Physician Services of Broward County, Inc. v. Ortiz*.⁸⁴ Referring to *Ortiz*, the Second District said “the court concluded that the Unfair Trade Act was enacted to protect in-state consumers. ‘Other states can protect their own residents.’ We agree that only in-state consumers can pursue a valid claim under the Unfair Trade Act.”⁸⁵ The court rejected cases referred to by the proposed class by distinguishing them because they were based on common law, rather than statutory law.⁸⁶ In doing so, the court stated:

The Plaintiffs point to several cases in which nationwide classes have been certified to argue that the trial court did not abuse its discretion in certifying such a class. However, in those cases, none of the plaintiffs pursued claims under a state statutory scheme. Rather, the plaintiffs alleged claims under common law theories that could be applied nationwide. In contrast, the applicable statutes in this case limit who can bring an action under the statute. A nationwide class that allows entities to circumvent the express statutory language is impermissible. Therefore, the trial court’s or-

80. *Id.* at 1039. At least one of the plaintiffs was a Florida corporation, and at least one contract between plaintiff and defendant was executed in the State of Florida. *Id.* at 1037, 1040.

81. *Id.* at 1039–42.

82. *Océ*, 760 So. 2d at 1040.

83. *Id.* at 1042.

84. *Id.*

85. *Id.* (quoting *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999) (citation omitted)).

86. *Id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Broin v. Philip Morris Cos.*, 641 So. 2d 888 (Fla. 3d Dist. Ct. App. 1994); *Cox v. Shell Oil Co.*, No. CIV.A.18844, 1995 WL 775363, at *1 (Tenn. Ch. Nov. 17, 1995)).

der certifying a nationwide class pursuant to the Unfair Trade Act must be reversed.⁸⁷

The result in *Océ*, the non-application of the FDUTPA to non-residents, is in agreement with that of *Ortiz*, but conflicts with that of *Glassman*.⁸⁸

D. *FDUTPA Applied in Millennium Communications & Fulfillment, Inc. v. Department of Legal Affairs*

An important decision regarding the extraterritorial application of the Florida Deceptive and Unfair Trade Practices Act was *Millennium Communications & Fulfillment, Inc. v. Department of Legal Affairs*.⁸⁹ In this July, 2000 case, Millennium Communications & Fulfillment, Inc. ("Millennium"), a Florida corporation, advertised and marketed a credit card program by mail and phone to residents solely outside the State of Florida.⁹⁰ Millennium sent postcards to consumers with poor credit histories to promote a credit card program that could assist the consumers in rebuilding positive credit reports.⁹¹ The wording on the postcard said: "**CONGRATULATIONS! YOU HAVE BEEN SELECTED TO RECEIVE A CREDIT CARD** with an unsecured credit limit of **\$4,000 Guaranteed** regardless of your past credit history!" as well as other representations.⁹² Upon receipt of the postcard, consumers were instructed to call an "800" number for further information and were then told they could receive an unsecured credit card with a \$4000 credit limit that could be used to charge the purchase of goods from catalogs which would be provided by the company that issued the credit card.⁹³ After providing information to the phone representatives, including payment of a \$129 fee that was automatically withdrawn from their checking accounts, consumers would receive an Advantage credit card which could only be used to order from catalogs that were subsequently sent with the Advantage credit card.⁹⁴ Along with the card and catalogs, consumers were given a list of re-

87. *Océ*, 760 So. 2d at 1042 (referencing *Shutts*, 472 U.S. at 797; *Broin*, 641 So. 2d at 888; *Cox*, 1995 WL 775363, at *1).

88. Compare *Océ*, 760 So. 2d at 1042, and *Ortiz*, 764 So. 2d at 8, with *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439–40 (Fla. 4th Dist. Ct. App. 1999).

89. 761 So. 2d 1256 (Fla. 3d Dist. Ct. App. 2000).

90. *Id.* at 1257. Millennium was licensed by a Nevada company, Continental Consumer Credit Corporation ("Continental"), to "promote Continental's Advantage credit card program in all states except Florida, Kansas, Wisconsin, and North Carolina." *Id.*

91. *Id.*

92. *Id.* at 1258 n.2.

93. *Millennium*, 761 So. 2d at 1258 n.3.

94. *Id.* at 1258.

quirements that they had to fulfill in order to become eligible to apply for a Visa or MasterCard credit card.⁹⁵ The requirements included the down payment of fifty percent of the total amount of orders, payment of an additional eight percent charge on orders for shipping and handling, total charges (excluding down payments) of at least \$500 that are then completely paid for, and six months of timely payments.⁹⁶ Once a consumer met these requirements, the consumer could then apply for a Visa or MasterCard credit card, and if approved, the consumer would be required to pay an additional fee, separate from the \$129 fee paid to Millennium for the Advantage credit card.⁹⁷

The Department of Legal Affairs alleged that the language in the postcard was likely to mislead consumers reasonably acting under the circumstances to believe that they would be receiving a Visa or MasterCard credit card, and so the mailing was deceptive and a violation of the FDUTPA.⁹⁸ The Department also claimed that representations were expressly or impliedly made to consumers who called the “800” number that they would receive a Visa or MasterCard.⁹⁹ The complaint also alleged that few, if any, consumers received a Visa or MasterCard through the program touted by Millennium, because they did not meet the necessary requirements.¹⁰⁰ The Department of Legal Affairs sought injunctive relief, namely to enjoin Millennium from continuing to engage in the alleged deceptive conduct, civil penalties of \$10,000 for each act or practice found to be a violation of the FDUTPA, and reimbursement to consumers.¹⁰¹

The trial court found the postcard that Millennium sent out to be deceptive and granted the motion of the Department of Legal Affairs for a temporary injunction to enjoin Millennium from continuing to use it.¹⁰² The parties were also ordered, in consultation with a special master, to create a revised postcard that would include disclosures and disclaimers to consumers on what they would and would not receive, as well as other changes that the court ordered.¹⁰³ This revised version of Millennium’s postcard was to be

95. *Id.* at 1258–59.

96. *Id.* at 1258.

97. *Id.* at 1259.

98. *Millennium*, 761 So. 2d at 1263.

99. *Id.* at 1258.

100. *Id.* at 1259.

101. *Id.*

102. *Id.*

103. *Millennium*, 761 So. 2d at 1259. The trial court ordered the new postcard to have a street address, rather than the post office box address previously used, and the “sales pitch script” was to conform to the newly created postcard. *Id.*

subject to the approval of the Department of Legal Affairs.¹⁰⁴ Millennium appealed the trial court's injunctive order.¹⁰⁵

1. Application of the FDUTPA to Conduct Directed to Non-Residents

On appeal, Millennium argued first that the FDUTPA does not apply to consumers who reside outside of the State of Florida and therefore, the temporary injunction should not have been granted.¹⁰⁶ Millennium argued in the alternative that if the FDUTPA does apply to its conduct, the injunctive order was still improper because its postcard was not deceptive.¹⁰⁷ Finally, they asserted that should the postcard be found deceptive, it was erroneous for the trial court to have ordered that the Department of Legal Affairs have approval over the revised postcard because that directive "constituted an improper delegation of judicial authority to the executive branch."¹⁰⁸

The Third District Court of Appeal first considered the claim related to the extraterritorial application of the FDUTPA.¹⁰⁹ To determine the intended scope of the Act, the court looked to the legislative intent as expressly stated in the purpose section of the statute, as interpreted by case law, and as explained in secondary material.¹¹⁰ The court also took notice of the way that key terms were defined and the use of certain words throughout the statute, for example, "'interested party or person' means *any* person affected by a violation of this part or *any* person affected by an order of the enforcing authority."¹¹¹ The court also recognized that the statute lacked any expression of limitation in terms of confining the enforcement power of the Department of Legal Affairs to only trade conduct that affects Florida residents.¹¹² The court stated, "[i]n the absence of any such limiting language, we decline to construe chapter 501 as limiting the Department's enforcement authority to commercial transactions involving only Florida."¹¹³

104. *Id.*

105. *Id.*

106. *Id.* at 1260.

107. *Millennium*, 761 So. 2d at 1260.

108. *Id.*

109. *Id.*

110. *Id.* at 1261 (citing FLA. STAT. § 501.202 (1997); *Acosta v. Richter*, 671 So. 2d 149, 153 (Fla. 1996); *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992); *Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d Dist. Ct. App. 1997); David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, 74 FLA. B.J. 49, 49 (2000) [hereinafter *Federbush III*]).

111. *Millennium*, 761 So. 2d at 1261 (citing § 501.203(6)).

112. *Millennium*, 761 So. 2d at 1261.

113. *Id.* (citing *Holly v. Audle*, 450 So. 2d 217, 219 (Fla. 1984); *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610, 612 (Fla. 5th Dist. Ct. App. 1991)).

2. Reconciling the Court's Holding with Other Decisions

Millennium referred the court to *Coastal Physician Services of Broward County, Inc. v. Ortiz*, discussed above, in which the Fourth District Court of Appeal granted certiorari to limit discovery to only Florida residents for claims made under the FDUTPA.¹¹⁴ In regards to Millennium's citation to the Fourth District Court of Appeal's opinion in *Ortiz*, the Third District Court of Appeal stated:

[w]ith due respect to our sister court, we are not persuaded by this holding as it applies to FDUTPA because as we have earlier noted, there are no geographical or residential restrictions contained in the express language of section 501.202. Moreover, in its later decision of *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (Fla. 4th DCA 1999), wherein the same court found that FDUTPA had applicability to both in-state and out-of-state residents in a class action, it appears to us that the fourth district has receded, *sub silentio*, from its earlier holding in *Ortiz*.¹¹⁵

In addition to rejecting the Fourth District Court of Appeal's decision in *Ortiz*, the Third District Court of Appeal distinguished decisions from other state and federal courts that Millennium presented to demonstrate that state consumer protection statutes were not extended to trade conduct that occurred outside of the state.¹¹⁶ The reason that the court provided for the distinction was that the cases that Millennium cited were each based upon a state consumer protection statute which *did* contain language limiting its reach to only conduct within its state.¹¹⁷ The court provided citations to other cases which held the state consumer protection statutes of Illinois, New Hampshire, and Ohio were also not restricted to the protection of in-state residents only.¹¹⁸

114. *Id.* at 1261 (citing *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999)).

115. *Id.* at 1261–62 (referring to *Ortiz*, 764 So. 2d at 8).

116. *Id.* at 1262 (citing *Att'y Gen. of Md. v. Dickson*, 717 F. Supp. 1090, 1101 (D. Md. 1989); *Bass v. Hendrix*, 931 F. Supp. 523, 536 (S.D. Tex. 1996); *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988).

117. *Millenium*, 761 So. 2d at 1262.

118. *Id.* at 1262 n.5 (citing *Perry v. Household Retail Servs., Inc.*, 953 F. Supp. 1370 (M.D. Ala. 1996; *Cirone-Shadow v. Union Nissan of Waukegan*, No. 94 C 6723, 1995 WL 238680 (N.D. Ill. Apr. 20, 1995); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 504 (D.N.H. 1996); *Brown v. Mkt. Dev., Inc.*, 322 N.E.2d 367, 369 (1974)).

3. Conclusion: Justification for the Protection of Non-Residents by the FDUTPA

By its holding in *Millennium*, the Third District Court of Appeal allowed the application of the Florida Deceptive and Unfair Trade Practices Act to a scenario in which the parties injured by the alleged deceptive trade practices were *solely* residents outside of the State of Florida. The court explained its rationale for allowing the FDUTPA to apply:

[a]s we read FDUTPA, it seeks to prohibit unfair, deceptive and/or unconscionable practices which have transpired within the territorial boundaries of this state without limitation. Therefore, where the allegations in this case reflect that the *offending conduct* occurred entirely within this state, we can discern no legislative intent for the Department to be precluded from taking corrective measures under FDUTPA *even where those persons affected by the conduct reside outside of the state*.¹¹⁹

It is interesting to note that the court characterized the “offending conduct” as having occurred entirely within the State of Florida, without specifying which exact act performed by Millennium was the “offending conduct,” particularly when you consider the fact that the receipt of the postcards by the consumers occurred wholly outside the state.¹²⁰ Incidentally, after determining that the FDUTPA applied to the claims of the non-residents, the court considered the other claims on appeal in *Millennium*, found that the postcard that Millennium sent to the non-resident consumers was not sufficiently deceptive and therefore reversed the injunction that had been ordered by the circuit court.¹²¹

E. *FDUPTA Not Applied* in *Hutson v. Rexall Sundown, Inc.*

A more recent case, *Hutson v. Rexall Sundown, Inc.*,¹²² was decided by the Fourth District Court of Appeal in February 2003. Similarly to *Glassman*, one aspect of this case involved whether Florida law applied to the claims of all potential class members, even those who did not reside within the state, in order to determine if the requirements of class certification were met.¹²³ However, unlike the Fourth District Court of Appeal’s decision in

119. *Id.* at 1262 (emphasis added).

120. *See id.*

121. *Id.* at 1264.

122. 837 So. 2d 1090 (Fla. 4th Dist. Ct. App. 2003).

123. *Id.* at 1093.

Glassman, here, the court held that the FDUTPA did not apply to the claims of non-residents of Florida.¹²⁴

The facts of *Hutson* involve the purchase, by nationwide consumers, of calcium supplements manufactured by Rexall Sundown, Inc. ("Rexall"), a company headquartered in Florida.¹²⁵ The alleged deceptive trade practice arose out of the labeling of two particular products as "Calcium 900" and "Calcium 1200."¹²⁶ The class representatives allege that Rexall's labeling of these products and their point of purchase marketing and advertising misled consumers into erroneously believing that they would obtain 900 and 1200 milligrams of calcium by taking one softgel of each respective product, when in fact it was necessary to take three softgels of the Calcium 900 to obtain 900 milligrams of calcium, and two softgels of the Calcium 1200, in order to obtain 1200 milligrams of calcium.¹²⁷ *Hutson* alleges that this deceptive conduct therefore resulted in the cost of a dose being higher than represented and the consumers receiving less than the amount of calcium they believed they were consuming.¹²⁸

1. Certification of the Class

As in *Glassman*, rule 1.220(a) and (b) of the *Florida Rules of Civil Procedure* needed to be met in order to grant class certification.¹²⁹ The trial court found that "the typicality, adequacy, predominance, superiority, and manageability requirements" of these rules were not met and therefore, denied *Hutson*'s motion to certify the class.¹³⁰ The predominance element of rule 1.220(b) involved a question of whether Florida law applied to the entire class; it states: "the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual

124. *Id.* at 1094.

125. *Id.* at 1091. The case opinion does not provide the reason the FDUTPA is used as a basis for the claims, the business location of Rexall Sundown, Inc., its principal place of business, or the state in which it is incorporated; however, the company maintains a website on the internet which states that it is "one of South Florida's leading businesses" and that its headquarters are located in Boca Raton, Florida. See *id.* at 1090-95; Company Profile of Rexall Sundown, Inc., available at <http://www.rexallsundown.com/pages/locations.aspx> (last visited Apr. 1, 2004).

126. *Hutson*, 837 So. 2d at 1091.

127. *Id.*

128. *Id.*

129. FLA. R. CIV. P. 1.220(a)-(b).

130. *Hutson*, 837 So. 2d at 1091.

members of the class.”¹³¹ If it was determined that the laws of their respective states would apply to the non-resident class members, rather than Florida law, then common questions of law would not predominate and the class could not be certified.¹³² The class representatives appealed the decision of the lower court which found the laws of other states did apply to those non-resident class members and therefore rejected class certification.¹³³

2. *Hutson* in Relation to *Glassman*, *Ortiz*, and *Océ*

The appellants in *Hutson* argued that the holding of *Glassman*, in which the FDUTPA applied to the claims of non-residents of Florida, applied to their case as well.¹³⁴ The Fourth District Court of Appeal distinguished *Glassman* from *Hutson* on the grounds that sufficient contacts with Florida existed in *Glassman* to warrant the application of Florida law to the whole class and because in *Glassman*, “the common injury occurred in Florida.”¹³⁵ The appellants referred the court to the statement by the Third District Court of Appeal in *Millennium* which recognized the apparent overruling of *Ortiz*, the case now being relied upon by the court.¹³⁶ In response, the Fourth District Court of Appeal proclaimed their disagreement with their sister court’s assessment of their holding in *Glassman* as superceding their decision in *Ortiz*.¹³⁷ The court went on to distinguish *Glassman* from *Ortiz* based upon the location of the claimed injuries.¹³⁸ The court said that the injuries in *Ortiz* occurred inside and outside the State of Florida, preventing the use of Florida law for all claims, and analogized *Océ* in this regard, as well.¹³⁹ The injuries claimed in *Glassman*, on the other hand, occurred only in Florida, per the trial court’s determination in that case.¹⁴⁰

131. FLA. R. CIV. P. 1.220(b)(3); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1092 (Fla. 4th Dist. Ct. App. 2003).

132. *Hutson*, 837 So. 2d at 1093.

133. *Id.*

134. *Id.*

135. *Id.* at 1093–94 (citing *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 438–39 (Fla. 4th Dist. Ct. App. 1999)).

136. *Id.* at 1094 (citing *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1262 (Fla. 3d Dist. Ct. App. 2000) (discussing *Coastal Physician Servs., Inc. v. Ortiz*, 764 So. 2d 7 (Fla. 4th Dist. Ct. App. 1999))).

137. *Hutson*, 837 So. 2d at 1094.

138. *Id.*

139. *Id.* (citing *Ortiz*, 764 So. 2d at 8; *Océ Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So. 2d 1037, 1042 (Fla. 2d Dist. Ct. App. 2000)).

140. *Id.* (citing *Glassman*, 738 So. 2d at 438).

In *Hutson*, the Fourth District Court of Appeal discussed the extraterritorial location of the injuries claimed and resulting non-application of the FDUTPA:

[h]ere, the alleged deceptive unfair trade practice involved the nationwide sale of products with a misleading label and with misleading point of purchase marketing techniques. The claims asserted in the national class action occurred both in the state of Florida and in 49 other states. The alleged wrong was committed, and the damage done, at the site of the sale of appellees' products; that is, in the various states where members of the purported class made their purchases. We hold that the trial court correctly concluded that common issues of law do not predominate because the claims of non-resident consumers would require the application of consumer protection laws from each of the states where the deceptive trade practice occurred and the non-resident claimants suffered injury.¹⁴¹

3. *Hutson* Analogized to *Stone v. CompuServe Interactive Services, Inc.*¹⁴²

The court cited their decision in *Stone* as applying similar reasoning to a similar set of facts.¹⁴³ There, an attempt was made at class certification for plaintiffs who alleged breach of contract as a result of not receiving, or not timely receiving, a rebate offered by CompuServe to purchasers of particular computers who also selected internet service with CompuServe.¹⁴⁴ The class was not certified by the Circuit Court because of the failure to meet all needed requirements of Rule 1.220 of the *Florida Rules of Civil Procedure*.¹⁴⁵ The lower court's decision not to certify the class was affirmed by the Fourth District Court of Appeal, which stated, "Florida has insufficient contacts with the purported class members of other states to justify the application of Florida's contract law to a nationwide class."¹⁴⁶

In *Stone*, the Court distinguished the matter from *Glassman*, because there, Florida had significant contacts to the case to justify the use of Florida law.¹⁴⁷ By then applying Florida law, namely, the FDUTPA, "a single statute

141. *Id.*

142. 804 So. 2d 383 (Fla. 4th Dist. Ct. App. 2001).

143. *See id.* at 385, 389–90; *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. 4th Dist. Ct. App. 2003).

144. *Stone*, 804 So. 2d at 385.

145. *Id.* at 387.

146. *Id.* at 389.

147. *Id.* (discussing its decision in *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1999)).

applied to all claims, so there was a predominance of common legal issues.”¹⁴⁸ In *Stone*, however, the Court found that the various states represented by the potential class members would apply varying standards to determine if there was a breach of contract. The difference between the state laws eliminated the presence of common issues of law that would predominate in a nationwide class, as required for class certification.¹⁴⁹ Though the Fourth District Court of Appeal referred to *Stone* in its *Hutson* decision, perhaps an important difference between *Hutson* and *Stone* is that in *Hutson*, all claims were based upon the FDUTPA as opposed to *Stone*, where the claims were made for breach of contract, a common law basis.¹⁵⁰ According to Florida’s conflict of law rules, the determination of a breach of contract is governed by the state’s law where the contract was made or performed.¹⁵¹ Therefore, in *Stone*, the use of each consumer’s state law was appropriate, and the differences between the state laws eliminated the presence of common issues of law that would predominate and allow class certification.¹⁵² The FDUTPA, however, has been applied to cases where non-residents of the state of Florida commenced action against Florida companies and it was determined that the “offending conduct” or the “common injury” occurred within the state.¹⁵³ The court in *Hutson* decided that the “common injury” had not occurred within the State, because its determination of the place of injury was at the place of purchase in each of the fifty states.¹⁵⁴

4. Significance of the Court’s Decision

Hutson is important for its clarification by the Fourth District Court of Appeal that it did not intend for its holding in *Glassman* (allowing the FDUTPA to apply to claims made by non-residents of Florida), to supercede its earlier decision in *Ortiz*, where discovery was limited to the alleged FDUTPA violations of Florida residents only.¹⁵⁵ Additionally, it raises issues about what factors the courts should consider when faced with claims

148. *Id.*

149. *Stone*, 804 So. 2d at 389.

150. Compare *Hutson*, 837 So. 2d at 1091, with *Stone v. CompuServe Interactive Servs., Inc.*, 804 So. 2d 383, 389 (Fla. 4th Dist. Ct. App. 2001).

151. *Stone*, 804 So. 2d at 389.

152. *Id.*

153. See *Glassman*, 738 So. 2d at 439; Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs, 761 So. 2d 1256, 1262 (Fla. 3d Dist. Ct. App. 2000).

154. *Hutson*, 837 So. 2d at 1094.

155. *Id.*

based upon the Florida Deceptive and Unfair Trade Practices Act by non-residents of the state.¹⁵⁶

IV. CONCLUSION: COMPARISON OF THE VARIOUS DECISIONS

Both *Glassman* and *Millennium* held that the protection offered by the Florida Deceptive and Unfair Trade Practices Act is available to consumers who are not residents of the State of Florida.¹⁵⁷ While the Third District Court of Appeal in *Millennium* determined that the “offending conduct” or practices must have occurred within the state in order for the FDUTPA to provide a claim to injured persons, regardless of their residency status, other decisions have relied on seemingly different factors.¹⁵⁸

In *Glassman*, the Fourth District Court of Appeal mentioned the determination by the Seventeenth Circuit Court that the “common injury” occurred in Florida as one reason for allowing the application of the FDUTPA to claims of out-of-state residents.¹⁵⁹ The Fourth District Court of Appeal, however, applied a “significant contact” test as developed in *Shutts* to decide the issue of whether common questions of law existed such that class certification should have been granted.¹⁶⁰

Hutson seemed to consider both the “offending conduct”, like in *Millennium*, and the “place of injury” as in *Glassman*, evidenced by the court’s statement that “[t]he alleged wrong was committed, and the damage done, at the site of the sale of appellees’ products.”¹⁶¹ In *Hutson*, the court explained

156. See *id.* (determining that the alleged wrong took place in all fifty states, and so the various states’ laws should apply); *Glassman*, 738 So. 2d at 438 (considering the “common injury” took place in Florida and also applying a “significant contact” test to determine that state interest was created, allowing the application of Florida law); *Millennium*, 761 So. 2d at 1262 (finding that the “offending conduct” occurred within the state by a Florida corporation, and so the application of the FDUTPA was appropriate to claims made entirely by non-residents of the state).

157. *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1999); *Millennium*, 761 So. 2d at 1262.

158. Compare *Millennium*, 761 So. 2d at 1262, with *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999) (finding the availability of the FDUTPA as a statutory basis for a consumer’s claim is determined by whether the consumer is a Florida resident), and *Glassman*, 738 So. 2d at 438, 439–40 (noting that the common injury to all potential class members occurred in Florida, and holding that Florida had sufficient contacts and state interest in the claims of the entire class, such that the application of its law was proper to all potential class members, both residents and non-residents).

159. *Glassman*, 738 So. 2d at 438.

160. *Id.* at 439 (referring to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985)).

161. *Hutson*, 837 So. 2d at 1094.

that it was using the place of sale to determine where the “wrong was committed” and the “damage done.”¹⁶² In *Glassman*, a similar logic seems to have been employed, as the site of the “common injury” was the place (Florida) where payment was made of the port charges in question.¹⁶³

But, in *Millennium*, the Third District Court of Appeal held that the “offending conduct occurred *entirely* within this state” when the postcards in question were mailed only to non-residents, and presumably received by them solely outside of the state.¹⁶⁴ The offending conduct therefore, must have been some act that Millennium performed prior to receipt by the non-residents, as its operations were located within Florida.¹⁶⁵ If the same analysis were applied to *Hutson*, it would seem that marketing, manufacturing, or other operations performed by Rexall Sundown, Inc. at their Florida business location could have provided the source of “offending conduct” needed to allow the FDUTPA to apply to the claims of non-residents in that case.¹⁶⁶ Perhaps, based upon the conflicting decisions between the various district courts of appeal, the time may be ripe for certification to the Supreme Court of Florida, or legislative amendments to the statute to determine what the reach of the Florida Deceptive and Unfair Trade Practices Act should be in relation to non-residents of the State of Florida.¹⁶⁷

162. *Id.*

163. *Glassman*, 738 So. 2d at 438.

164. *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1257, 1262 (emphasis added).

165. *See id.* at 1262.

166. *See id.*; Company Profile, Locations & Facilities, available at Corporate Website of Rexall Sundown, Inc., <http://www.rexallsundown.com/pages/locations.aspx>.

167. *Compare Millennium*, 761 So. 2d at 1262 (finding that the “offending conduct” occurred within the state by a Florida corporation, and so the application of the FDUTPA was appropriate to claims made entirely by non-residents of the state), and *Glassman*, 738 So. 2d at 439 (noting that the common injury to all potential class members occurred in Florida, and holding that Florida had sufficient contacts and state interest in the claims of the entire class, such that the application of its law was proper to non-residents), with *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999) (finding the availability of the FDUTPA as a statutory basis for a consumer’s claim is determined by whether the consumer is a Florida resident), and *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. 4th Dist. Ct. App. 2003) (determining that the alleged wrong took place in all fifty states, and so the various states’ laws should apply).

A HISTORY OF APPORTIONING JOINT OFFERS OF JUDGMENT IN FLORIDA: IS *WILLIS SHAW* REALLY THE BOTTOM LINE, OR IS THERE AN EXCEPTION?

KATHERINE H. MILLER*

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I. INTRODUCTION

Attorney's fees are near and dear to the hearts of most lawyers, and an award of fees by the court is much desired among attorneys. A decision that awards attorney's fees stipulates that one party will pay the other party's legal costs and expenses. An award for attorney's fees allows attorneys to satisfy their clients, and at the same time, ensure their own payment.

A. *The American Rule*

Prior to the American Revolution, the courts in the American colonies followed the "English Rule" and customarily awarded attorney's fees to the prevailing party in civil cases.¹ However, the institution of a new govern-

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1. Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1147-48 (Fla. 1985).

ment, and new courts in the United States, ended the reliance on this British tradition.² The majority of American courts branched off from the traditional “English Rule” and ceased in the award of fees to prevailing parties.³

In Florida, the courts follow the common law “American Rule” regarding the entitlement to attorney’s fees.⁴ Usually fees are only awarded if there is an exception to the common law rule.⁵ An exception can be imposed by either the judiciary⁶ or the legislature,⁷ or by contractual agreement between the parties.⁸

B. Section 768.79 of the Florida Statutes and Rule 1.442 of the Florida Rules of Civil Procedure

The most common exceptions to the “American Rule” are created by the legislature.⁹ Section 768.79 of the *Florida Statutes* is one such legislative exception that awards fees for offers of judgment.¹⁰ An offer of judgment is “[a] settlement offer by one party to allow a specified judgment to be taken against the party,”¹¹ and the words *offer of judgment*¹² are sometimes used interchangeably with *demand for judgment*¹³ or *proposal for settlement*.¹⁴ Section 768.79 stipulates that a party is entitled to fees and costs if it serves an offer of judgment that is not accepted within thirty days, and the resulting court judgment is either twenty-five percent greater than or less than the offered judgment depending upon the party.¹⁵ This section of the *Florida Statutes* is applied through the procedural power of rule 1.442 of the *Florida Rules of Civil Procedure*.¹⁶

2. *Id.* at 1148.

3. *Id.*

4. *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995) (citing *Rowe*, 472 So. 2d at 1148).

5. *Id.*

6. See *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998). The judiciary has imposed one small exception to the American Rule, and, in a very narrow scope, judges are permitted to award fees based on a party’s wrongdoing. *Id.* This rare type of judgment is called “[t]he inequitable conduct doctrine [and] permits the award of attorney’s fees where one party has exhibited egregious conduct or acted in bad faith.” *Id.*

7. *Peña*, 664 So. 2d at 960.

8. *Rowe*, 472 So. 2d at 1148.

9. See *Peña*, 664 So. 2d at 960.

10. See FLA. STAT. § 768.79(1) (2002).

11. BLACK’S LAW DICTIONARY 1112 (7th ed. 1999).

12. § 768.79.

13. *Id.*

14. FLA. R. CIV. P. 1.442.

15. See § 768.79(1).

16. See FLA. R. CIV. P. 1.442.

The award of attorney's fees becomes a penalty for a party who neglects to accept the offer of judgment to end the case.¹⁷ However, offers of judgment were not designed as devices of intimidation.¹⁸ Their purpose is "as a tool of encourage[ment]" to persuade the parties to settle.¹⁹ It is beneficial to all parties to "terminate all claims, end disputes, and obviate the need for further intervention of the judicial process."²⁰ Costs, attorney's fees, and extensive time can all be saved with a resolution through an offer of judgment. Thus, there is quite a bit of persuasion for all parties involved to attempt to settle a dispute before actually progressing with litigation.

This article will discuss awards of attorney's fees for offers of judgment in Florida. Although there have been various notes of contention about this type of award, this piece will focus primarily on the conflict of apportioning the offer of judgment among all parties. Part II of this article separately analyzes the history of section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*, and then studies how the two function together for an award of attorney's fees. Part III specifically focuses on apportioning offers of judgment among multiple parties. It looks at the treatment of the issue by various District Courts of Appeal, focusing on whether they strictly construed the apportionment requirement, or found an exception. Part IV will discuss *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*,²¹ the case in which the Supreme Court of Florida attempted to finally resolve the apportionment issue. It will also analyze lingering questions that are evident among the Florida District Courts of Appeal after the *Willis Shaw Express, Inc.* ("Willis Shaw") decision.

II. COMBINING THE STATUTE AND THE RULE

While section 768.79 of the *Florida Statutes* provides the substantive law for offers of judgment, rule 1.442 of the *Florida Rules of Civil Procedure* presents the means of properly applying the statute.²² Because rule 1.442 supplements section 768.79, the two function mutually, and when pro-

17. Julie H. Littky-Rubin, *Proposals for Settlement: Minding Your P's and Q's Under Rule 1.442*, 75 FLA. B.J. 12 (Feb. 2001) (citing *Abbott & Purdy Group Inc. v. Bell*, 738 So. 2d 1024, 1026 (Fla. 4th Dist. Ct. App. 1999)).

18. *Kaufman v. Smith*, 693 So. 2d 133, 134 (Fla. 4th Dist. Ct. App. 1997) (Hazouri, J., concurring) (suggesting that the statute should do more to clarify the purpose of the rule).

19. *Id.*

20. *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989).

21. 849 So. 2d 276 (Fla. 2003), *reh'g denied*, No. SC02-1521, 2003 Fla. LEXIS 1168, at *1 (Fla. June 26, 2003).

22. Gary M. Pappas & Joye B. Walford, Trial Lawyers Forum, *Proposals for Settlement — More Traps for the Unwary*, 76 FLA. B.J. 69 (Dec. 2002).

posing an offer of judgment, it is always best to use them together, and refer to both, to prevent any mistakes or unnecessary misunderstandings.²³

A. Section 768.79 of the Florida Statutes

Through section 768.79 of the *Florida Statutes*, the Florida Legislature implemented a compulsory right to attorney's fees, if the requirements of the statute have been fulfilled.²⁴ Although section 768.79 is found in the negligence section, in Title XLV, of the *Florida Statutes*, there is no uncertainty in the language of section 768.79, which declares it applicable "[i]n any civil action for damages filed in the courts of this state"²⁵

The Fourth District Court of Appeal addressed this language in *Beyel Bros. Crane & Rigging Co. of South Florida v. Ace Transportation, Inc.*,²⁶ and found section 768.79 unambiguous and comprehensive in scope, holding it applicable to all civil actions in Florida where one party claims damages from another.²⁷ In *Beyel Bros.*, the district court overruled the circuit court's holding that section 768.79 was only applicable to negligence, and indicated the extensive scope of the section.²⁸ In its decision, the district court noted that in 1990 the legislature had specifically changed the wording of section 768.79 to include all civil actions,²⁹ in contrast to the earlier version that only applied section 768.79 to the negligence part of the *Florida Statutes*.³⁰

Section 768.79 of the *Florida Statutes* applies to all parties, either plaintiff or defendant, who file offers of judgment.³¹ Also, the offer of judgment will still be valid even if it is a joint offer.³² If the defendant in a civil action

files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf . . . from the date of filing of the offer if the

23. Littky-Rubin, *supra* note 17, at 14.

24. See *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995); *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993).

25. § 768.79(1).

26. 664 So. 2d 62 (Fla. 4th Dist. Ct. App. 1995).

27. *Id.* at 64.

28. *Id.*

29. *Id.*

30. *Id.*

31. See § 768.79(1).

32. *V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp.*, 650 So. 2d 199, 201 (Fla. 4th Dist. Ct. App. 1995) (per curiam).

judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer.³³

The same is true for a plaintiff:

[i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.³⁴

Thus, section 768.79 establishes an "'entitlement' to fees,"³⁵ which is determined by the judgment, subject to any payments received or settlement amounts.³⁶ However, the judgment is not measured by the jury verdict,³⁷ and section 768.79 does not apply to a voluntary dismissal where there would be no finding of liability, unless it is dismissed with prejudice.³⁸

After the basic circumstances of entitlement are established, section 768.79 of the *Florida Statutes* provides four requirements that an offer must fulfill in order to be used as the basis for an award of attorney's fees and costs.³⁹ First, to be in full compliance, an offer must reference section 768.79, and be in writing.⁴⁰ Second, it needs to state the names of the offeror and the offeree.⁴¹ Also, the offer must "[s]tate with particularity the amount offered to settle a claim for punitive damages," and finally, to comply with the section 768.79, an offer has to "[s]tate its total amount."⁴² If the offer complies with the four elements, the statutory requirements are met, and attorney's fees should be awarded.

In *Schmidt v. Fortner*,⁴³ the Fourth District Court of Appeal addressed the basic fulfillment of section 768.79 requirements and found a basis for an offer of judgment where the amount of the offer was in the general range of the value of the missing assets.⁴⁴ The court held that an award of fees only

33. § 768.79(1).

34. *Id.*

35. *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993).

36. § 768.79(6)(b).

37. *Allstate Ins. Co. v. Sutton*, 707 So. 2d 760, 761 (Fla. 2d Dist. Ct. App. 1998) (citing *Stewart v. Progressive Am. Ins. Co.*, 595 So. 2d 272 (Fla. 1st Dist. Ct. App. 1992)).

38. *MX Invs., Inc. v. Crawford*, 700 So. 2d 640, 642 (Fla. 1997).

39. *See* § 768.79(2)(a)-(d).

40. § 768.79(2)(a).

41. § 768.79(2)(b).

42. § 768.79(2)(c)-(d).

43. 629 So. 2d 1036 (Fla. 4th Dist. Ct. App. 1993).

44. *Id.* at 1039.

hinges on the amount offered and the amount of the judgment, not on the reasonableness of the offer.⁴⁵ Two years later, the Supreme Court of Florida followed the holding in *Schmidt*, and upheld the constitutionality of section 768.79 in *TGI Friday's, Inc. v. Dvorak*.⁴⁶ In *Dvorak*, the Supreme Court of Florida ruled that the only way a court could refuse to award fees under section 768.79 was if the offeror did not make the offer in good faith.⁴⁷

However, good faith is not an easy determination, and each case must be examined in depth, on its own merits.⁴⁸ In *Fox v. McCaw Cellular Communications of Florida, Inc.*,⁴⁹ the defendants gave the plaintiffs an offer of judgment for \$100, which strictly followed the statutory requirements of section 768.79.⁵⁰ The plaintiffs argued that the offer was not made in good faith because of the proposal's nominal amount, but the Fourth District Court of Appeal disagreed.⁵¹ The court reasoned that if the offeror "had a reasonable basis at the time of the offer to conclude that their exposure was nominal," the offer was in good faith.⁵² Because the offer of \$100 was in good faith, with a reasonable basis, the court in *Fox* agreed that the defendant was entitled to fees.⁵³ Accordingly, awards for offers of judgment, pursuant to section 768.69, are based solely on the statutory requirements, without room for judges' discretion.⁵⁴

45. *Id.* at 1039–40. The district court stated:

To require the exacting proof that a prima facie case entails would be both contrary to the text and quite antithetical to the purpose and intent of the statute. It would clearly discourage making good faith offers of settlement early in a case, i.e. before the parties have expended substantial sums in attorney's fees and costs for discovery and preparation for trial.

Id. at 1039.

46. 663 So. 2d 606, 611 (Fla. 1995).

47. *Id.* (citing *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993)). The Supreme Court of Florida reasoned "the statute as a whole leaves no doubt that the reasonableness of the rejection is irrelevant to the question of entitlement. However, it is equally clear that these enumerated factors are intended to be considered in the determination of the amount of the fee to be awarded." *Id.* at 613.

48. *Fox v. McCaw Cellular Communications of Fla., Inc.*, 745 So. 2d 330, 333 (Fla. 4th Dist. Ct. App. 1998) (per curiam).

49. *Id.* at 330.

50. *Id.* at 333.

51. *Id.*

52. *Id.*; accord *State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So. 2d 874 (Fla. 2d Dist. Ct. App. 1997) (per curiam).

53. *Fox*, 745 So. 2d at 333.

54. David L. Kian, *The 1996 Amendments to the Florida Rule of Civil Procedure 1.442 — Reconciling a Decade of Confusion*, 71 FLA. B.J. 32, 35 (July/Aug. 1997).

B. Rule 1.442 of the Florida Rules of Civil Procedure

Rule 1.442 of the *Florida Rules of Civil Procedure* is in place for the same purpose as section 768.79 of the *Florida Statutes*, which “is to encourage settlements and eliminate trials whenever possible by imposing cost sanctions against an offeree who fails to accept a timely offer which equals or exceeds the amount of the offeree’s ultimate recovery.”⁵⁵ However, because of discrepancies between the provisions in rule 1.442 and section 768.79, there has always been conflict among litigants and courts regarding offers of judgment.⁵⁶ As a result, rule 1.442 does not fulfill its intended purpose to alleviate the judicial system of its burdensome caseload; instead, it adds to it.⁵⁷

Consequently, in 1988, the Supreme Court of Florida noted the continuing conflict and asked “the Civil Procedure Rules Committee (the ‘Committee’) to examine” the problem.⁵⁸ When the court did not think that the Committee had come up with a satisfactory decision in 1989, the court substituted its own method, which combined parts of section 768.79 with rule 1.442, resulting in a custom tailored provision.⁵⁹ At the same time, the court ensured the support of its new rule and held “[t]o the extent the procedural aspects of new rule 1.442 are inconsistent with sections 768.79 and 45.061, the rule shall supersede the statutes.”⁶⁰ Unfortunately, the Supreme Court of Florida was not specific enough and much of the conflict continued.⁶¹

In 1992, attempting to put an end to the confusion that continued in the trial and appellate courts, the Supreme Court of Florida decided *Timmons v. Combs*.⁶² In *Timmons*, rule 1.442 of the *Florida Rules of Civil Procedure* and section 768.79 of the *Florida Statutes* were procedurally in conflict, and

55. *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 981 (Fla. 1987) (per curiam); see also *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989) (reasoning that rule 1.442 of the *Florida Rules of Civil Procedure* is in place to prevent necessity of judicial interaction).

56. *Littky-Rubin*, *supra* note 17, at 12 (citing *Sec. Prof’ls, Inc. v. Segall*, 685 So. 2d 1381, 1384 (Fla. 4th Dist. Ct. App. 1997)); see also *Timmons v. Combs*, 608 So. 2d 1, 1–2 (Fla. 1992) (clarifying that section 45.061 and section 768.79 of the *Florida Statutes* are also similar because both allow awards of attorney’s fees, but under section 45.061 the award is granted only if the settlement is unreasonably rejected). See generally *Kian*, *supra* note 54, at 36 n.2 (explaining section 45.061 not applicable to claims arising after October 1, 1990).

57. *Littky-Rubin*, *supra* note 17, at 12.

58. Fla. Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442, 550 So. 2d 442 (Fla. 1989) (per curiam).

59. *Kian*, *supra* note 54, at 34.

60. Fla. Bar Re: Amendment, 550 So. 2d at 443.

61. *Kian*, *supra* note 54, at 34.

62. 608 So. 2d 1 (Fla. 1992).

caused the court to address the proper process for obtaining attorney's fees by using offers of judgment.⁶³ In its opinion, the court repealed rule 1.442, and stated that because section 768.79 was the only current statute on offers of judgment, the court would use its procedural powers to implement the procedural aspects of section 768.79 as its own rule 1.442.⁶⁴

Rule 1.442 of the *Florida Rules of Civil Procedure*, as adopted in *Timmons*, continued to be the standard until 1996, when it was once again amended, and changed to include the supreme court's decision in *Timmons*.⁶⁵ The committee in charge of analyzing the needed amendments to rule 1.442 noted that the new rule was an attempt to resolve the continuing problems the courts had construing the rule.⁶⁶ They added that the new rule 1.442 "supercedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions."⁶⁷

After being amended once more in 2000, rule 1.442 of the *Florida Rules of Civil Procedure* still reflects the recommendations of the committee in 1996.⁶⁸ It is valid for all offers or proposals for settlement, "and supercedes all other provisions of the rules and statutes that may be inconsistent with this rule."⁶⁹ Among its various provisions, the rule lists procedural requirements that an offer of judgment must satisfy.⁷⁰ The specific language of

63. *Id.* at 3.

64. *Id.*

65. *In re Amendments to Fla. Rules*, 682 So. 2d 105, 125–26 (Fla. 1996) (per curiam) (underlining omitted). The "rule was amended to reconcile, where possible, sections . . . 768.79, [of the] Florida Statutes, and the decisions of the Florida Supreme Court in . . . *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), and *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992)." *Id.*

66. *Id.*

67. *Id.* at 126 (underlining omitted).

68. See FLA. R. CIV. P. 1.442(a).

69. *Id.*

70. See FLA. R. CIV. P. 1.442(c). The requirements for offers of judgment under rule 1.442 of the *Florida Rules of Civil Procedure* are as follows:

(c) Form and Content of Proposal for Settlement.

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

(D) state the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

rule 1.442 allows joint offers by noting, “[a] proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal.”⁷¹ Also, rule 1.442 delves further into the specificities of joint proposals with a provision that is in the middle of most of the conflict and insists “[a] joint proposal shall state the amount and terms attributable to each party.”⁷²

C. The Statute and Rule in Conflict

Presently, section 768.79 of the *Florida Statutes* is the only statute that governs offers of judgment. After years of revising and amending rule 1.442 of the *Florida Rules of Civil Procedure*, it would seem that the statute and rule should be in complete accord; however, there is still a problem when using section 768.79 and rule 1.442. The problem stems from the 1996 amendment of rule 1.442 that was partially implemented to correspond with the Supreme Court of Florida’s decision in *Fabre v. Marin*,⁷³ which required the comparison of fault among all defendants.⁷⁴ As a result, even though section 768.79 has no such requirement,⁷⁵ rule 1.442 differs, and specifically requires that offers of judgment be apportioned among multiple parties.⁷⁶

Clearly, the difference in the requirements of rule 1.442 and section 768.79 cause difficulties since the rule requires something that the statute makes no mention of. The inconsistency makes it difficult for attorneys to serve legally sufficient offers of judgment when there is a conflict in the law. Usually, the *Florida Rules of Civil Procedure* provide attorneys with clear procedural requirements, but when substantive law conflicts with a rule, interpretation tends to vary among attorneys and judges. The requirement of apportionment in offers of judgment is found in the *Florida Rules of Civil Procedure*.⁷⁷ However, the provision must be analyzed to see if it is truly

(F) state whether the proposal includes attorneys’ fees and whether attorneys’ fees are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080(f).

FLA. R. CIV. P. 1.442(c)(1)-(2).

71. FLA. R. CIV. P. 1.442(c)(3).

72. *Id.*

73. 623 So. 2d 1182 (Fla. 1993). The court held joint and several liability applicable to economic damages, and required the jury to apportion fault among the parties who contributed to the injury. *Id.* at 1185.

74. Littky-Rubin, *supra* note 17, at 14.

75. See § 768.79 (2002).

76. FLA. R. CIV. P. 1.442(c)(3).

77. See *id.*

procedural, and thus controlling, since many areas of substantive and procedural law overlap or conflict.⁷⁸

A test cited by the Supreme Court of Florida is that “[p]ractice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. ‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.”⁷⁹ The requirement to include specific apportionments in an offer of judgment is a method or step to enforce substantive rights and, therefore, it is a procedural requirement.

The Florida Constitution addresses the power of the courts over procedure.⁸⁰ Article V, § 2 states: “The supreme court shall adopt rules for the practice and procedure in all courts”⁸¹ Article V, § 2, does give the legislature the power to retract procedural rules; however, nowhere in Article V, or the rest of the Florida Constitution, does the legislature have procedural rulemaking power.⁸²

Since the Supreme Court of Florida has the ultimate procedural power, when a statute attempts to control procedure in a way that conflicts with, or encroaches on, the power of the court to create rules, the legislature’s statute is required to acquiesce to the court’s rule.⁸³ A case on point is *Leapai v. Milton*,⁸⁴ where section 45.061 of the *Florida Statutes* was found to be in conflict with rule 1.442 of the *Florida Rules of Civil Procedure*.⁸⁵ In its holding, the Supreme Court of Florida was able to filter out the substantive law in the statute, allowing rule 1.442 to control the procedure and act in conjunction with only the substantive aspects of section 45.061.⁸⁶

78. *In re Clarification of Fla. Rules of Practice & Procedure*, 281 So. 2d 204 (Fla. 1973) (per curiam).

79. *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (per curiam).

80. FLA. CONST. art. V, § 2(a) (1885).

81. *Id.*

82. *Carmel v. Carmel*, 282 So. 2d 9, 10 (Fla. 3d Dist. Ct. App. 1973) (per curiam). The legislature required awards of attorneys’ fees to be remanded, but the Third District Court of Appeal found the law was beyond legislative powers and invalid because it was a procedural rule. *Id.* The district court stated:

while the legislature could, pursuant to the Constitution, repeal a rule of practice adopted by the Supreme Court, it was without constitutional authority to promulgate a rule of practice or procedure for the appellate or trial courts, to operate as a substitute or an alternative to the rule thus repealed, or otherwise.

Id.

83. *Ong v. Mike Guido Props.*, 668 So. 2d 708, 710 (Fla. 5th Dist. Ct. App. 1996) (citing *Leapai v. Milton*, 595 So. 2d 12, 15 (Fla. 1992)).

84. 595 So. 2d 12 (Fla. 1992).

85. *Id.* at 15.

86. *Id.*

That same reasoning is found in the supreme court's opinion regarding the 1989 amendments to the *Florida Rules of Civil Procedure*, where the court held that rule 1.442 would supercede any conflicting provisions in section 768.79 of the *Florida Statutes*.⁸⁷ The actual language of the rule follows the same train of thought and provides for its own superiority.⁸⁸

Thus, the fact that section 768.79 does not address apportioning offers of judgment among multiple parties is of no consequence. As a procedural rule implementing section 768.79, rule 1.442 has priority and requires that any offers of judgment "state the amount and terms attributable to each party."⁸⁹

III. JOINT OFFERS

As previously noted, the *Florida Rules of Civil Procedure* permit joint offers of judgment by stating: "[a] proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal."⁹⁰ While, section 768.79 of the *Florida Statutes* is silent on this issue, the case law of this state illustrate that Florida courts have continuously accepted joint offers.⁹¹

One case that exemplifies the courts' continuing acceptance of joint offers is *Government Employees Insurance Co. v. Thompson*,⁹² decided by the Second District Court of Appeal.⁹³ In *Thompson*, the court disagreed with the appellee's argument that the joint offer of judgment, proposed by the two offerors, was invalid because it was not joint and several.⁹⁴ The court rationalized its decision to permit the joint offer by indicating that they "found no cases that hold a joint offer invalid per se, while numerous cases have recognized, without comment, the validity of joint offers."⁹⁵

Similarly, in *V.I.P. Real Estate Corp. v. Florida Executive Realty Management Corp.*,⁹⁶ the appellants argued that attorney's fees should not have been awarded, because the demand for judgment submitted by the appellee

87. Fla. Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442, 550 So. 2d 442, 443 (Fla. 1989).

88. See FLA. R. CIV. P. 1.442(a).

89. FLA. R. CIV. P. 1.442(c)(3).

90. *Id.*

91. JAMES C. HAUSER, ATTORNEY'S FEES IN FLORIDA 4-52 (2d ed. 2002).

92. 641 So. 2d 189 (Fla. 2d Dist. Ct. App. 1994).

93. *Id.*

94. *Id.* at 190.

95. *Id.* The court further stated that the character of the offer as a joint offer, might be relevant on remand to the analysis of whether an offer is made in good faith. *Id.*

96. 650 So. 2d 199 (Fla. 4th Dist. Ct. App. 1995) (per curiam).

was invalid for being a joint offer.⁹⁷ Denying the appellants' argument, the Fourth District Court of Appeal found that on other occasions, Florida courts recognized joint offers and that in the instant case, the joint offer of judgment was valid.⁹⁸

Given that cases clearly interpret section 768.79 of the *Florida Statutes* and the language of rule 1.442 of the *Florida Rules of Civil Procedure* to permit joint offers, under Florida law the use of a joint offer of judgment is not objectionable.⁹⁹ However, while there is no question that joint offers are permitted, confusion arises in the implementation of such offers. Although rule 1.442 clearly states that joint offers "shall state the amount and terms attributable to each party,"¹⁰⁰ that amended provision requiring apportionment did not become effective until January 1, 1997.¹⁰¹ Thus, there was a problem of various courts' interpretations of the amendment's retroactive effect, and the requirement that offers of judgment *shall* be apportioned among multiple parties.¹⁰²

A. Offers to Multiple Offerees

Courts have strictly interpreted the effect that the amended portion of rule 1.442 has on offers of judgment, served to multiple offerees, after the amendment became effective in 1997.¹⁰³ However, there was a split among the courts on the issue of whether offers of judgment served prior to the amendment's effective date had to be apportioned among multiple parties.¹⁰⁴ The uncertainty questioned whether the amended provision was retroactively effective on offers of judgment served prior to 1997; or whether section 768.79, or the former version of rule 1.422, had the same, or similar requirements as the current rule's apportionment specification.¹⁰⁵

97. *Id.* at 201.

98. *Id.* (citing *Thompson*, 641 So. 2d at 190).

99. See *Thompson*, 641 So. 2d at 190; *V.I.P. Real Estate*, 650 So. 2d at 201.

100. FLA. R. CIV. P. 1.442(c)(3).

101. *Allstate Indem. Co. v. Hingson*, 808 So. 2d 197, 199 n.2 (Fla. 2002) (per curiam).

102. *Pappas & Walford*, *supra* note 22, at 72. Specifically, multiple decisions have differed on apportionment among offers from joint offerors. *Id.*

103. *Id.* at 69; e.g. *United Servs. Auto. Ass'n, v. Behar*, 752 So. 2d 663, 664 (Fla. 2d Dist. Ct. App. 2000); see also *Ford Motor Co. v. Meyers*, 771 So. 2d 1202, 1204 (Fla. 4th Dist. Ct. App. 2000) (holding that offer of judgment to multiple defendants must provide the specific amount for each party even if there is an indemnification agreement between the defendants).

104. *Allstate Indem. Co. v. Hingson*, 774 So. 2d 44 (Fla. 2d Dist. Ct. App. 2000) (per curiam).

105. See *id.*; see generally HAUSER, *supra* note 91 (discussing the various decisions of the Florida District Courts of Appeal).

Bodek v. Gulliver Academy, Inc.,¹⁰⁶ a Third District Court of Appeal case, addressed the issue and found that apportionment was not required for offers served prior to the 1997 amendment.¹⁰⁷ In *Bodek*, the plaintiffs were served with an offer of judgment in 1993.¹⁰⁸ In its December 1997 decision, the court found that the words “the Plaintiffs” in the offer fulfilled the provisions of section 768.79 as applicable to multiple plaintiffs.¹⁰⁹ The court went further to deny the Bodeks’ contrasting arguments, and found no requirement of apportionment in section 768.79 of the *Florida Statutes*.¹¹⁰ However, the court did note in dicta that rule 1.442 of the *Florida Rule of Civil Procedure* had been amended.¹¹¹

The Fourth District Court of Appeal followed the Third District Court of Appeal’s analysis, in *Herzog v. K-Mart Corp.*,¹¹² a slip and fall case in which K-Mart served an offer of judgment on the plaintiffs in 1996.¹¹³ The court denied any requirement for apportionment among multiple parties, stating that before the 1997 amendment to rule 1.442, neither the rule, nor section 768.79, required that offers of judgment be apportioned among multiple parties.¹¹⁴ It further held that K-Mart’s “offer of judgment, served prior to the amendment to the rule, was not rendered ineffective to trigger the sanctions of the statute merely because it was a joint offer which failed to specify the amount attributable to each plaintiff.”¹¹⁵

Conversely, the Second District Court of Appeal took an entirely different approach than the Third and Fourth District Courts of Appeal.¹¹⁶ In 1996, before the amendment to rule 1.442 became effective, the Second District Court of Appeal decided *Twiddy v. Guttenplan*.¹¹⁷ In *Twiddy*, an offer of judgment was filed on behalf of two defendants who agreed to pay the plain-

106. 702 So. 2d 1331 (Fla. 3d Dist. Ct. App. 1997) (per curiam).

107. *Id.* at 1332.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Bodek*, 702 So. 2d at 1332. In its note, the Third District Court of Appeal illustrates how the Bodeks’ arguments were in line with the new amendment, but makes no mention of how, or if, it would retroactively affect this decision. *Id.* at 1332 n.1.

112. 760 So. 2d 1006 (Fla. 4th Dist. Ct. App. 2000), *overruled in part by* Allstate Indem. Co. v. Hingson, 808 So. 2d 197 (Fla. 2002).

113. *See id.* at 1009.

114. *Id.*

115. *Id.*; *see also* V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp., 650 So. 2d 199, 200–01 (Fla. 4th Dist. Ct. App. 1995) (per curiam) (holding that single demand for judgment made to both appellants, was invalid because joint offers were permitted).

116. *See* Allstate Indem. Co. v. Hingson, 774 So. 2d 44, 44 (Fla. 2d Dist. Ct. App. 2000).

117. 678 So. 2d 488 (Fla. 2d Dist. Ct. App. 1996).

tiff \$5000 in exchange for a release applicable to all defendants.¹¹⁸ In rendering the decision the court noted that the total offer on behalf of both defendants was for \$5000, making it

impossible to determine the amount attributable to each offeree in order to make a further determination whether the judgment against only one of the offerees for \$2,100 was at least twenty-five percent less than the offer on her behalf. The fact that the offer was made on behalf of two defendants who were not joint tortfeasors makes the necessary determinations as to the applicability of section 768.79 impossible to perform with any certainty.¹¹⁹

Thus, the court denied any entitlement to an award of attorney's fees, not in reference to rule 1.442, but because it found that the offer of judgment was not specific enough to comply with the requirements of section 768.79 of the *Florida Statutes*.¹²⁰

Four years later, in March of 2000, the Second District Court of Appeal followed its *Twiddy* judgment with a similar decision in *C & S Chemicals, Inc. v. McDougald*.¹²¹ *C & S Chemicals* relates how in 1996, the plaintiffs served a joint demand for judgment, but failed to apportion the amount among the three defendants.¹²² Since the failure to apportion the demand prevented the defendants from applying their "right to evaluate the 1996 demand independently based on their individual liability situations," the Second District Court of Appeal decided that the demand for judgment was unenforceable, and there was no entitlement to attorney's fees.¹²³ When resolving the problem, the court mentioned that the 1997 amendment to rule 1.442 of the *Florida Rules of Civil Procedure* was not effective in regards to this demand.¹²⁴ The court held that prior cases, such as *Twiddy*, unmistakably stood for the same interpretation of section 768.79 and earlier versions of the rule, which required apportionment.¹²⁵

Later the same year, the conflicts between the district courts came to a head in *Allstate Indemnity Co. v. Hingson*.¹²⁶ At that time, the Second District Court of Appeal affirmed the circuit court's holding that attorney's fees

118. *Id.* at 489.

119. *Id.*

120. *Id.*

121. 754 So. 2d 795 (Fla. 2d Dist. Ct. App. 2000) (per curiam).

122. *Id.* at 796.

123. *Id.* at 798.

124. *Id.* at 797 n.3.

125. *Id.* at 797-98.

126. 774 So. 2d 44 (Fla. 2d Dist. Ct. App. 2000) (per curiam).

could not be awarded for an offer of judgment in which the offeror failed to apportion the amount offered for two plaintiffs' claims.¹²⁷ The district court of appeal also specifically mentioned the conflict between the courts, citing the Fourth District Court of Appeal's decision in *Herzog v. K-Mart*.¹²⁸

Thus, when the Supreme Court of Florida was faced with the appeal of *Allstate Indemnity Co. v. Hingson*¹²⁹ it cited its jurisdiction from the district courts' conflict between *Hingson* and *Herzog*.¹³⁰ In the appeal of *Hingson*, the question proposed by the court was "whether the former version of Florida Rule of Civil Procedure 1.442 required an offer of settlement made by a defendant to multiple plaintiffs to state the amount and terms attributable to each plaintiff."¹³¹ Citing to *C & S Chemical* and *United Services Automobile Ass'n v. Behar*,¹³² the Supreme Court of Florida remarked on the purpose of section 768.79, and the requirement of apportionment, which promotes the statutory objective by allowing an offeree to evaluate the specific terms of the offer personal to that offeree.¹³³ Furthering the importance of the point, the court reasoned that if there is no specific basis to ascertain the exact amount an individual was offered, there is no way to compare it to see if the judgment is within twenty-five percent of the offer.¹³⁴ The court presented additional support by interpreting legislative intent in section 768.79, finding "'party' in the singular . . . [to indicate] intent that an offer specify the amount attributable to each individual party."¹³⁵ Accordingly, the Supreme Court of Florida followed the reasoning of the Second District Court of Appeal, and held that rule 1.442 and section 768.79, both before, and after the

127. *Id.*

128. *Id.*; see *Herzog v. K-Mart Corp.*, 760 So. 2d 1006 (Fla. 4th Dist. Ct. App. 2000).

129. 808 So. 2d 197 (Fla. 2002) (per curiam).

130. *Id.*; see FLA. CONST. art. V, § 3(b)(3). The Supreme Court of Florida has the power to:

review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Id.

131. *Hingson*, 808 So. 2d at 199 (footnote omitted).

132. 752 So. 2d 663 (Fla. 2d Dist. Ct. App. 2000). A single defendant served an offer of judgment after the 1997 amendment became effective. *Id.* at 664. However, the defendant failed to fully comply with rule 1.442, and because the offer was served as a "lump sum amount" that did not provide the necessary specifics as to each of the two plaintiffs, it was defective, and no attorney's fees were awarded. *Id.*

133. *Hingson*, 808 So. 2d at 199. The purpose, or statutory objective, of section 768.79 is as a "tool to encourage" the parties to settle. *Kaufman v. Smith*, 693 So. 2d 133, 134 (Fla. 4th Dist. Ct. App. 1997) (Hazouri, J., concurring).

134. *Hingson*, 808 So. 2d at 199.

135. *Allstate Indem. Co. v. Hingson*, 7800 So. 2d 197, 199 (Fla. 2002) (per curiam).

1997 amendment, require that offers of judgment to multiple parties be apportioned to each offeree.¹³⁶

After the *Hingson* decision, and the amendment to rule 1.442 of the *Florida Rules of Civil Procedure*, the courts still found exceptions in wrongful death and vicarious liability cases, and have permitted awards of attorney's fees for undifferentiated offers of judgment served to multiple offerees in those two circumstances.¹³⁷ As discussed in *Thompson v. Hodson*,¹³⁸ in which the personal representative of an estate received a valid "lump-sum, non-specific" proposal for settlement, a wrongful death case is atypical under rule 1.442.¹³⁹ Whereas there might be multiple claimants, Florida law requires that one plaintiff bring the action as the decedent's personal representative, and claim for the estate and all survivors.¹⁴⁰ The First District Court of Appeal addressed this in a similar case, *Dudley v. McCormick*,¹⁴¹ and stated:

[a] defendant in a wrongful death action need not apportion a proposed settlement among the estate and survivors on behalf of whom the personal representative is acting in order to comply with the requirements of section 768.79 and Florida Rule of Civil Procedure 1.442. No such proposed apportionment would bind the personal representative in any event.¹⁴²

This is because the representative, as a singular party, is authorized to accept an offer and then later apportion it among the claimants, subject to court approval if needed.¹⁴³ Since multiple parties cannot bring a wrongful death action, the representative is viewed individually and is excepted from the apportionment requirement.

The second exception in apportionment among offerees, is vicarious liability, and although it was not addressed in the Supreme Court of Florida's *Hingson* opinion, it is questionable after that ruling.¹⁴⁴ In *Strahan v. Gauldin*,¹⁴⁵ the Fifth District Court of Appeal found an undifferentiated offer

136. *Id.*

137. See 4 HON. DAVID M. GERSTEN, FLORIDA CIVIL PRACTICE GUIDE 92-14 to 16 (2003).

138. 825 So. 2d 941 (Fla. 1st Dist. Ct. App. 2002), *rev. denied*, 835 So. 2d 266 (Fla. 2002).

139. See *id.* at 948-49.

140. *Id.* at 949 (citing FLA. STAT. § 768.20 (1993)).

141. 799 So. 2d 436 (Fla. 1st Dist. Ct. App. 2001).

142. *Id.* at 441.

143. *Hodson*, 825 So. 2d at 950.

144. See HAUSER, *supra* note 91, at 4-55 to 58; GERSTEN, *supra* note 137, at 92-14 -16.

145. 756 So. 2d 158 (Fla. 5th Dist. Ct. App. 2000), *overruled by* *Matetzschk v. Lamb*, 849 So. 2d 1141 (Fla. 5th Dist. Ct. App. 2003).

of judgment to multiple offerees valid where two of the defendants were vicariously liable to the third.¹⁴⁶ Holding that apportionment is illogical when all the offerees are liable for everything, the court rationalized that “[b]ecause of that joint and several liability, none of the individual defendants were adversely affected by the joint offer.”¹⁴⁷ Following the same line of reasoning, in *Safelite Glass Corp. v. Samuel*,¹⁴⁸ the Fourth District Court of Appeal found that a lack of differentiation in an offer was “no[t] harmful error” and did not inhibit a true assessment of the offer, where one offeree was vicariously liable for the other offeree’s negligence.¹⁴⁹ Later case law addresses these findings and their viability.

B. *Offers from Multiple Offerors: The Divergence*

While, with few exceptions, the apportionment rule regarding joint offerees seemed to be clear, until recently the districts were split, with no clear path to follow, concerning decisions of apportioning offers of judgment among multiple offerors.¹⁵⁰ Much of this disagreement between the district courts concerns the purpose behind the amendment to rule 1.442 of the *Florida Rules of Civil Procedure* and the method of construction that should be used in the interpretation of the rule.

In *Flight Express, Inc. v. Robinson*,¹⁵¹ where two defendants made an offer of judgment for \$100 without stating the amount that each would contribute, the Third District Court of Appeal reversed the circuit court’s denial of attorney’s fees.¹⁵² The Third District Court of Appeal found that the offerors should not be denied fees because a lack of apportionment among the offerors would not make a difference on whether the offeree would accept the proposal, and it “does not, impair the ability of the defendants . . . to recover under section 768.79”¹⁵³ Delving into the intent behind rule 1.442

146. *Strahan*, 756 So. 2d at 161.

147. *Id.*; see also *Crowley v. Sunny’s Plants, Inc.*, 710 So. 2d 219, 221 (Fla. 3d Dist. Ct. App. 1998) (holding a general joint offer to two defendants valid when represented by the same attorney, with no conflict of interest between defendants and insurance company, and when one defendant is vicariously liable for the other defendant’s liability).

148. 771 So. 2d 44 (Fla. 4th Dist. Ct. App. 2000).

149. *Id.* at 46; see also *Ford Motor Co. v. Meyers*, 771 So. 2d 1202, 1204 n.1 (Fla. 4th Dist. Ct. App. 2000) (supporting vicarious liability exception in *Safelite Glass* by reference that current case differed because the indemnification agreement between the parties did not prevent recovery from a defendant).

150. *Pappas & Walford*, *supra* note 22, at 72.

151. 736 So. 2d 796 (Fla. 3d Dist. Ct. App. 1999), *overruled in part* by *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

152. *Flight Express, Inc.*, 736 So. 2d at 797.

153. *Id.*

of the *Florida Rules of Civil Procedure*, the court indicated that the rule was amended in 1997 to correspond with the decision in *Fabre v. Marin*.¹⁵⁴ In the court's view, the purpose of rule 1.442 is to prevent problems with multiple offerees, and for that reason the failure of offerors to specifically follow the rule creates no difficulties and "must be considered merely a harmless technical violation which [does] not affect the rights of the parties."¹⁵⁵

Following the Third District Court of Appeal, the Fourth District Courts of Appeal decided *Safelite Glass Corp. v. Samuel*, a case where two plaintiffs, as offerors, did not indicate any partition in their offer.¹⁵⁶ The offer was not accepted, but because the failure to apportion among the offerors was not the reason, the district court affirmed the circuit court's award of attorney's fees.¹⁵⁷ Since rule 1.442 was created to protect multiple offerees, the Fourth District Court of Appeal held that the failure to divide the damages in the offer was not in error.¹⁵⁸ Similarly, in *Spruce Creek Development Co., of Ocala v. Drew*,¹⁵⁹ two plaintiffs did not indicate any differentiation in an offer of judgment, but the Fifth District Court of Appeal found that the offer "was not void for having failed to separate the offer . . . [because] [t]he lack of apportionment between claimants is a matter of indifference to the defendant."¹⁶⁰

Again, the Second District Court of Appeal had a more stringent view of the requirements for multiple offerors, this time for apportionment among multiple offerors.¹⁶¹ The case of *Allstate Insurance Co. v. Materiale*¹⁶² is another instance where two plaintiffs offered a proposal for settlement, but neglected to separately indicate the amount and terms attributable to each offeror.¹⁶³ Referring to *United Services Automobile Ass'n v. Behar*,¹⁶⁴ the Second District Court of Appeal held that the same requirements, found in that case for offerees, apply to offerors.¹⁶⁵ The court applied the same apportionment requirements because an offeree who receives a proposal from mul-

154. *Id.* at 797 n.1; see *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

155. *Flight Express, Inc.*, 736 So. 2d at 797 n.1.

156. *Safelite Glass*, 771 So. 2d at 45.

157. *Id.* at 46.

158. *Safelite Glass Corp. v. Samuel*, 771 So. 2d 44, 46 (Fla. 4th Dist. Ct. App. 2000).

159. 746 So. 2d 1109 (Fla. 5th Dist. Ct. App. 1999), *overruled in part* by *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003), and *overruled in part* by *Matetzschk v. Lamb*, 849 So. 2d 1141 (Fla. 5th Dist. Ct. App. 2003)).

160. *Id.* at 1116.

161. See *Pappas & Walford*, *supra* note 22, at 72 (citing *Clipper v. Bay Oaks Condo. Ass'n*, 810 So. 2d 541 (Fla. 2d Dist. Ct. App. 2002)).

162. 787 So. 2d 173 (Fla. 2d Dist. Ct. App. 2001).

163. *Id.* at 174.

164. *United Servs. Auto. Ass'n v. Behar*, 752 So. 2d 663 (Fla. 2d Dist. Ct. App. 2000).

165. *Materiale*, 787 So. 2d at 174-75.

multiple offerors "is entitled to know the amount and terms of the offer that are attributable to each offeror in order to evaluate the offer as it pertains to that party."¹⁶⁶ The Second District Court of Appeal went even further, and expressly stated its disagreement with the decisions of the Fifth and Third District Courts of Appeal, certifying a conflict with *Spruce Creek* and *Flight Express*.¹⁶⁷

Another Second District Court of Appeal case, *Clipper v. Bay Oaks Condominium Ass'n, Inc.*,¹⁶⁸ included an undifferentiated offer of judgment from three offerors to one offeree, which caused the court to deny any entitlement to attorney's fees.¹⁶⁹ The court cited its own strict compliance with the rule, and found the offer flawed, because the offeree did not know what particular amounts each of the offerors were presenting.¹⁷⁰

However, while noting that it did not apply in this case, in dicta the Second District Court of Appeal recognized an exception to its requirement of strict compliance of apportionment among multiple parties.¹⁷¹ Citing a previously decided case, *Danner Construction Co. v. Reynolds Metals Co.*,¹⁷² the court stated "a failure to apportion may be harmless error if 'the theory for the defendant's [sic] joint liability does not allow for apportionment.'"¹⁷³ In *Danner Construction*, the Second District Court of Appeal had specifically stated that in no way should this exception be construed too broadly, but in cases where there is vicarious liability among the defendant offerors, there is no way to differentiate the parties' joint liability.¹⁷⁴ Thus,

166. *Id.* at 175.

167. *Id.* The Second District Court of Appeal opposed the Fifth District Court of Appeal by reasoning that even if accepting the proposal would equally release the defendant from both plaintiffs' claims, that defendant has the right to know how much of the agreement is attributable to each party. *Id.* In regards to the Third District Court of Appeal, the Second District Court of Appeal held that the finding of a "harmless technical violation" was incorrect, and the Second District Court of Appeal did "not agree that such failure is harmless. An offer that requires an offeree to make an all or nothing determination regarding an offer made by two parties, without permitting it to evaluate each claim separately, does affect the rights of that party." *Id.*

168. 810 So. 2d 541 (Fla. 2d Dist. Ct. App. 2002).

169. *Id.*

170. See *id.* at 542-43. The court stated:

Only two of the three offerors, the condominium association and Midnight Pass, prevailed against Clipper. [Since] the proposal did not state the specific amount each defendant was willing to pay, the circuit court had no way to determine whether the condominium association and Midnight Pass had offered anything to settle the suit.

Id. at 543.

171. *Id.* at 542.

172. 760 So. 2d 199 (Fla. 2d Dist. Ct. App. 2000).

173. *Clipper*, 810 So. 2d at 542 (quoting *Danner Constr.*, 760 So. 2d at 202).

174. *Danner Constr.*, 760 So. 2d at 202.

an offer of judgment that fails to apportion the amounts among the offerors may be considered "a harmless violation of the rule."¹⁷⁵

Siding with the Second District Court of Appeal, the First District Court of Appeal favored a strict interpretation of rule 1.442, in *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*,¹⁷⁶ a case that would eventually result in an ultimate decision on the issue from the Supreme Court of Florida.¹⁷⁷ In *Hilyer Sod*, two plaintiffs joined their causes of action, and failing to apportion damages among themselves, offered a joint settlement to the defendant.¹⁷⁸ The court required strict construction of section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*, and found that the plaintiff's offer of settlement was invalid, preventing an award of attorney's fees under section 768.79.¹⁷⁹ Accordingly, the First District Court of Appeal also certified a conflict with *Flight Express* and *Spruce Creek*.¹⁸⁰

IV. THE SUPREME COURT OF FLORIDA DECIDES *WILLIS SHAW*

A. *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*¹⁸¹

Finally, in March 2003, the Supreme Court of Florida addressed the years of conflict in the district courts and issued the *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.* opinion, in which the court endeavored to set forth a definitive rule regarding apportioning offers of judgment.¹⁸² Like the First District Court of Appeal, the Supreme Court of Florida addressed the joint proposal of settlement that was presented to the defendant Hilyer Sod, Inc.¹⁸³ The proposal was from two plaintiffs to one defendant and pertinent portions read as follows:

3. The proposal will require plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, to sign a standard release in favor of defendant, HILYER SOD, INC., and to file a notice of dismissal with prejudice of the claims plaintiffs, WILLIS SHAW EXPRESS, INC. and EDWARD McALPINE, have filed against

175. *Id.*

176. 817 So. 2d 1050 (Fla. 1st Dist. Ct. App. 2002).

177. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003), *reh'g denied*, No. SC02-1521, 2003 Fla. LEXIS 1168, at *1 (Fla. June 26, 2003).

178. *Hilyer Sod*, 817 So. 2d at 1051-52.

179. *Id.* at 1054.

180. *Id.*

181. 849 So. 2d 276 (Fla. 2003).

182. *See id.*

183. *Id.* at 277.

defendant, HILYER SOD, INC., in this action.
 4. The total amount being offered with this proposal is NINETY-FIVE THOUSAND ONE AND NO/100 DOLLARS (\$95,001.00).¹⁸⁴

As the plain language of this offer confirms, the offer failed to differentiate terms or amounts between the offerors, and it did not afford the offeree a chance to evaluate the proposal as it pertained to each plaintiff. In their briefs to the Supreme Court of Florida, both the petitioners, and the respondent, primarily focused on methods of interpreting section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*.¹⁸⁵ The direct focus on differing methods of interpretation stemmed from the First District Court of Appeal's ruling that required strict compliance.¹⁸⁶ Whichever method of interpretation the supreme court chose would result in an absolute decision of the construction of the law governing apportionment of offers of judgment.¹⁸⁷

Petitioners, Willis Shaw Express and Edward McAlpine, argued that according to section 768.79 and rule 1.442, there was no need to differentiate between offerors, the offer they served on the defendant was valid, and they were entitled to attorney's fees.¹⁸⁸ Their brief to the court maintained that rule 1.442 "should be pragmatically, not strictly construed," and contended that because it was a procedural rule, it "should be given an interpretation to further justice not frustrate it."¹⁸⁹

Conversely, the respondent, Hilyer Sod, requested that the supreme court affirm the First District Court of Appeal's holding, and find the offer invalid, because it was an undifferentiated offer and did not state the amounts attributable to each offeror.¹⁹⁰ Further, the respondent claimed that both section 768.79 of the *Florida Statutes*, and rule 1.442 of the *Florida Rules of Civil Procedure*, should be strictly construed because they "are punitive in nature and are in derogation of the common law."¹⁹¹ Then, protecting itself from any alternative analysis by the court, the petitioner further asserted that

184. *Id.* at 277–78 (quoting *Hilyer Sod*, 817 So. 2d at 1051–52).

185. See Petitioners' Initial Brief on the Merits at 28, *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) (No. SC02-1521); Respondent's Answer Brief on the Merits at 6, *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003) (No. SC02-1521).

186. *Hilyer Sod, Inc. v. Willis Shaw Express, Inc.*, 817 So. 2d 1050, 1054 (Fla. 1st Dist. Ct. App. 2002).

187. See Petitioners' Brief at 28, *Willis Shaw* (No. SC02-1521); Respondent's Brief at 6, *Willis Shaw* (No. SC02-1521).

188. Petitioners' Brief at 6, *Willis Shaw* (No. SC02-1521).

189. *Id.* at 27–28 (emphasis omitted).

190. Respondent's Brief at 6, *Willis Shaw* (No. SC02-1521).

191. *Id.* at 24 (emphasis omitted).

“[i]f statute 768.79 or [rule] 1.442 are not strictly construed, then general rules of construction would be applied,”¹⁹² to give the language of the rule its “plain and ordinary meaning,” which would act to invalidate the offer.¹⁹³

Ultimately, the supreme court followed the respondent’s reasoning, affirming the district court’s finding that the proposal for settlement was invalid for failure to follow the requirements of rule 1.442.¹⁹⁴ In rendering its decision, the court cited established case law, and presented two grounds on which to base its decision that the language in rule 1.442 must be strictly construed.¹⁹⁵ The first reason the court gave, was that, courts in Florida generally follow the common law American Rule, which does not allow for awards of attorney’s fees, and because rule 1.442 and section 768.79 are in conflict with the common law, they have to be strictly construed.¹⁹⁶ Secondly, the court referred to “a well-established rule in Florida that ‘statutes awarding attorney’s fees must be strictly construed.’”¹⁹⁷

Consequently, with strict construction of the plain language of rule 1.442, the Supreme Court of Florida overruled the decisions in *Flight Express* and *Spruce Creek*, which had assumed that a failure to differentiate between offerors was of no consequence.¹⁹⁸ Now, just as amounts of offers of judgment must be apportioned among offerees, offerors must also allocate the total among themselves.¹⁹⁹ Accordingly, the *Willis Shaw* decision clarified the multitude of unreliable interpretations of section 768.79 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*.²⁰⁰ The Supreme Court of Florida conclusively held that the use of section 768.79 and rule 1.442 requires that the “language must be strictly construed.”²⁰¹

192. *Id.* at 28 (emphasis omitted).

193. *Id.* at 29 (quoting *Castillo v. Vlaminc de Castillo*, 771 So. 2d 609, 611 (Fla. 3d Dist. Ct. App. 2000) (citing *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993))).

194. *See Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 279 (Fla. 2003), *reh’g denied*, 2003 Fla. LEXIS 1168, at *1 (Fla. June 26, 2003).

195. *Id.* at 278.

196. *Id.*; *see Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077–78 (Fla. 2001). “This court has held that a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise . . .” *Id.*

197. *Willis Shaw*, 849 So. 2d at 278. (quoting *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995) (quoting *Gershuny v. Martin McFall Messenger Anesthesia Prof’l Ass’n*, 539 So. 2d 1131, 1132 (Fla. 1989))); *see also Peña*, 664 So. 2d at 960 (holding that Florida courts must heed the “plain and unambiguous language” in the law) (citing *Citizens of State v. Pub. Serv. Comm’n*, 425 So. 2d 534, 541–42 (Fla. 1982)).

198. *Willis Shaw*, 849 So. 2d at 279.

199. *Id.* at 278.

200. *Id.*

201. *Id.*

B. *Is There Still a Vicarious Liability Exception?*

The Supreme Court of Florida intended *Willis Shaw* to be the final decision on apportioning offers of judgment. Nevertheless, in the two months that followed the court's decision, cases emerged that suggest there still may be an exception to *Willis Shaw*. No exceptions were addressed anywhere in the supreme court's opinion, but it would seem that the court's designation requiring strict interpretation of section 768.79 and rule 1.442 was an all-encompassing decision.²⁰²

The Fifth District Court of Appeal did follow *Willis Shaw*, strictly interpreting section 768.79 and rule 1.442 in *Matetzschk v. Lamb*,²⁰³ where the plaintiff had failed to apportion an offer of judgment between two defendants on the basis of vicarious liability.²⁰⁴ In its decision, the Fifth District Court of Appeal applied the strict construction demanded in *Willis Shaw* and reversed the trial judge's award of attorney's fees.²⁰⁵ The court expressly denied any vicarious liability exception, and stated that the court's previous decision in *Strahan*, which allowed an exception, had been "implicitly reject[ed]" by *Willis Shaw*.²⁰⁶

However, the Second District Court of Appeal followed a different line of reasoning in *Barnes v. Kellogg Co.*²⁰⁷ and *Crespo v. Woodland Lakes Creative Retirement Concepts, Inc.*²⁰⁸ Each case was decided in the two months following the *Willis Shaw* decision, and in both the Second District Court of Appeal found an exception to the rule of strict interpretation.²⁰⁹

In *Barnes*, two defendants, one of whom was strictly liable for the other's error, served a joint proposal for settlement on the plaintiff, without apportioning terms or amounts.²¹⁰ The Second District Court of Appeal related this situation in *Barnes* to the vicarious liability exception previously established in *Danner Construction*, and held that because the defendants in *Barnes* were joint and severally liable, the proposal was valid.²¹¹ Justifying

202. See *Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 279 (Fla. 2003).

203. 28 Fla. L. Weekly D1148 (5th Dist. Ct. App. May 9, 2003), *opinion corrected and superceded by* No. 5D02-455, 2003 WL 21672984, at *1 (Fla. 5th Dist. Ct. App. July 18, 2003) (re-emphasizing the holding of the Fifth District Court of Appeal and rejecting the Second District Court of Appeal's analysis).

204. *Id.*

205. *Id.* at D1149.

206. *Id.*

207. 846 So. 2d 568 (Fla. 2d Dist. Ct. App. 2003).

208. 845 So. 2d 342 (Fla. 2d Dist. Ct. App. 2003).

209. See *id.* at 343; *Barnes*, 846 So. 2d at 571.

210. *Barnes*, 846 So. 2d at 569.

211. *Id.* at 571-72.

its decision, the court noted that the purpose of section 768.79 is to act as a catalyst towards settlement, and reasoned that unified joint offers in cases, like *Barnes*, should be permitted in order to further that goal.²¹² The court did not ignore *Willis Shaw*; instead, the court claimed that *Willis Shaw* had been thoroughly considered in the Second District Court of Appeal's decision that it did not overturn *Danner Construction*.²¹³ The court said, "we do not interpret that opinion [*Willis Shaw*] . . . as prohibiting the offer made in this case under these circumstances."²¹⁴ Thus, through its decision, not only did the Second District Court of Appeal uphold a vicarious liability exception, but it broadened that exception to all circumstances of joint and several liability.²¹⁵

Less than a month later, the Second District Court of Appeal supported a vicarious liability exception in *Crespo*.²¹⁶ Without mentioning the *Willis Shaw* decision, the court found an offer of judgment invalid because the proposal to two plaintiffs did not apportion the total between the plaintiffs.²¹⁷ However, in dicta, the court noted the validity of the vicarious liability exception to rule 1.442, found in *Danner Construction*, and explained, "[b]ecause apportionment is considered impossible in a vicarious liability case, the courts have relieved the parties of the requirement to apportion the offer in that type of case."²¹⁸

Therefore, once again there are conflicting decisions among the District Courts of Appeal. It remains to be seen if the rest of the district courts will follow the Fifth District Court of Appeal and strictly interpret the *Willis Shaw* decision as all-encompassing, or if they will follow the Second District Court of Appeal and the liberal construction of the holding that allows for an exception.

V. CONCLUSION

The Supreme Court of Florida meant for *Willis Shaw* to be the final ruling regarding apportioning offers of judgment. The court clearly required strict interpretation of section 768.89 of the *Florida Statutes* and rule 1.442 of the *Florida Rules of Civil Procedure*. Strict interpretation of the plain language results in the requirement that all offerees, and all offerors, appor-

212. *Id.* at 572.

213. *Id.*

214. *Id.*

215. *See Barnes*, 846 So. 2d at 571-72.

216. *Crespo*, 845 So. 2d at 343-44.

217. *Id.* at 343.

218. *Id.* at 344.

tion offers of judgment among multiple parties. Joint offers are common, and the requirement that offerors differentiate among multiple parties protects everyone involved, especially the offerees. No matter if the offeree is a plaintiff or defendant, the offeree must be able to inspect the offer as it pertains to him personally. Otherwise, the offer is not clearly defined in regards to each party involved. This results in a multitude of problems, including further litigation, especially if judgment is not rendered on all of the parties. A strict construction of the law allows no exceptions, and acts to protect every party, which is what the supreme court intended with its *Willis Shaw* decision.

However, within two months of the supreme court's decision, the Second and Fifth District Courts of Appeal issued different decisions on the applicability of the rule on undifferentiated offers pertaining to joint and several liability. With a disagreement so soon after *Willis Shaw*, more are sure to follow. Most likely, the Supreme Court of Florida will have to make another decision on this issue that appears so frequently throughout the Florida courts.

In fact, because of the of the extensive conflict, the Fifth District Court of Appeal sought to strengthen its viewpoint and issued a corrected opinion of *Matetzschk v. Lamb*.²¹⁹ In the new opinion, the court criticized the *Barnes* and *Crespo* decisions of the Second District Court of Appeal. The Fifth District Court of Appeal maintained that "the language of *Willis Shaw* is applicable whether the offer emanates from joint plaintiffs or is directed to joint defendants," and the supreme court decision unquestionably requires apportionment for every joint offer.²²⁰ The Fifth District Court of Appeal also reasoned that the decisions of the Second District Court of Appeal were "inconsistent with the purpose and language of the rule," especially since vicarious liability is such a disputed issue in most cases.²²¹

As the Fifth District Court of Appeal remarked, vicarious liability is a frequently litigated issue. Since, in many cases, liability is not established until the final judgment, the allegedly vicariously liable party may not even be part of the case when attorney's fees are awarded. If attorney's fees are awarded as a result of a lump-sum, joint offer, there is no way to tell what amount each party is responsible for. The confusion over responsibility is very likely to lead to judicial intervention, which is in complete degradation of the purpose of both, rule 1.442 of the *Florida Rules of Civil Procedure* and section 768.79 of the *Florida Statutes*. Therefore, the strict construction

219. 849 So. 2d 1141 (Fla. 5th Dist. Ct. App. 2003).

220. *Id.* at 1144.

221. *Id.*

of rule 1.442 and section 768.79, required by the Supreme Court of Florida, in *Willis Shaw*, does not allow for any exceptions, not even if it is only a harmless technical error. Offers of judgment *must be apportioned among every party*.

This frequently litigated area will continue to confuse attorneys and courts alike. Attorneys repeatedly use offers of judgment to protect their own liability, to ensure that they are paid, and to safeguard their clients' interests. Attorneys cannot afford to lose an award of fees for failing to follow the rules concerning offers of judgment. Therefore, they must apportion the terms and amounts of an offer to each party, no matter if offeror, offeree, plaintiff, or defendant. Using such a strict construction, and following every letter of the rule, is the only way to ensure that the courts will not invalidate an offer of judgment.

THE FLAT LEARNING CURVE

PHYLLIS COLEMAN*

If you've ever thought that some students just don't seem to get it, the following e-mail exchange should be of interest.

From: Paul Nonothin
Sent: Monday, January 5, 2004 2:00 PM
To: Professor Snodgrass
Subject: Sales Grades

Dear Professor Snodgrass:

Grades for your class have just been posted. What did I get?

Paul Nonothin

* * * * *

From: Professor Hiram Snodgrass
Sent: Monday, January 5, 2004 2:30 PM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

As you know, exams are graded anonymously. Consequently, I cannot tell you the grade you received because I do not know your number.

Professor Hiram Snodgrass

* * * * *

* Professor of Law, Nova Southeastern University. B.S., M.Ed., J.D., University of Florida.

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From: Paul Nonothin
Sent: Monday, January 5, 2004 5:00 PM
To: Professor Snodgrass
Subject: Re: Sales Grades

Professor Snodgrass:

My number is 0. What did I get?

Paul Nonothin

* * * * *

From: Professor Hiram Snodgrass
Sent: Monday, January 5, 2004 5:15 PM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

Zero is not a valid exam number. Please check with Student Services to get your actual number.

Professor Hiram Snodgrass

* * * * *

From: Paul Nonothin
Sent: Tuesday, January 6, 2004 2:30 PM
To: Professor Snodgrass
Subject: Re: Sales Grades

Professor Snodgrass:

I went to Student Services. They told me my number and said you had given me an "F." Obviously you made a mistake. Please correct it immediately.

Paul Nonothin

* * * * *

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THE FLAT LEARNING CURVE

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From: Professor Hiram Snodgrass
Sent: Tuesday, January 6, 2004 4:15 PM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

I repeat, I cannot check unless you give me your exam number.

Professor Hiram Snodgrass

* * * * *

From: Paul Nonothin
Sent: Tuesday, January 6, 2004 4:30 PM
To: Professor Snodgrass
Subject: Re: Sales Grades

Professor Snodgrass:

I forgot my number. Call Student Services. I know they have it.

Paul Nonothin

* * * * *

From: Professor Hiram Snodgrass
Sent: Tuesday, January 6, 2004 4:35 PM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

I will not check with Student Services. If you wish me to review your exam, you must give me your number.

Professor Hiram Snodgrass

* * * * *

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[Vol. 28:3:867

From: Paul Nonothin
Sent: Tuesday, January 6, 2004 5:30 PM
To: Professor Snodgrass
Subject: Re: Sales Grades

Professor Snodgrass:

My number is 1.

Paul Nonothin

* * * * *

From: Professor Hiram Snodgrass
Sent: Wednesday, January 7, 2004 9:15 AM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

I checked and there is no mistake. You missed every multiple choice question and failed to discuss any of the relevant issues in the two essays.

Professor Hiram Snodgrass

* * * * *

From: Paul Nonothin
Sent: Wednesday, January 7, 2004 9:30 AM
To: Professor Snodgrass
Subject: Re: Sales Grades

Dear Professor Snodgrass:

First let me say I am very mad that it took you so long to respond.

As for the exam itself, I never do well on multiple choice questions and don't think it was nice of you to point it out. Further, check and you will see I carefully filled in the machine-graded card. At least you should give me points for neatness.

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THE FLAT LEARNING CURVE

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In addition, while I understand I didn't hit any of the issues on the essays, it was not fair to give me an "F." Don't you know what that does to a person's self-esteem--to say nothing of his GPA?

I attended almost half the classes. I admit I was surfing the web most of the time but I kept my instant messaging to a minimum. Indeed, I told all my friends to only send emergency e-mails during your lectures.

By the way, I was very confused by the language in that U.C.C. thing you kept referring to. Just a friendly suggestion: You should eliminate that from the course the next time you teach it.

I also want you to know that I had to teach the course to many of the students in the class (because they couldn't understand you either). Inexplicably, they all got better grades than I did.

Paul Nonothin

* * * * *

From: Professor Hiram Snodgrass
Sent: Wednesday, January 7, 2004 10:15 AM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

Your grade will not be changed.

Professor Hiram Snodgrass

* * * * *

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NOVA LAW REVIEW

[Vol. 28:3:867

From: Paul Nonothin
Sent: Wednesday, January 7, 2004 4:00 PM
To: Professor Snodgrass
Subject: Re: Sales Grades

Dear Professor Snodgrass:

I just checked with Student Services and they have not yet received your grade change. When will you submit it?

Paul Nonothin

* * * * *

From: Professor Hiram Snodgrass
Sent: Thursday, January 8, 2004 10:15 AM
To: Paul Nonothin
Subject: Re: Sales Grades

Dear Mr. Nonothin:

As I said in my previous e-mail, there will be no grade change.

Professor Hiram Snodgrass

* * * * *

From: Paul Nonothin
Sent: Thursday, January 8, 2004 2:00 PM
To: Professor Howitzer
Subject: Family Law Grades

Dear Professor Howitzer:

Grades for your class have just been posted. What did I get?

Paul Nonothin

* * * * *

ONE FINE NOVEMBER

ROBERT M. JARVIS*

Like other law schools, East Overshoe State University provides its faculty and staff with a state-of-the-art e-mail system. This has greatly increased productivity and institutional camaraderie, as witnessed by the following recent exchange of messages.

To: Lisa Sheintag
From: Quentin Pomerantz
Re: Faculty Fax Machine
Date: November 3, 2003 - 9:06 a.m.

L - I was in over the weekend and noticed that the fax machine in the Faculty Copy Room is broken again. Can we get someone in to fix it?

Thanks,

Q.

* * * * *

To: Recipient
From: Lisa Sheintag
Re: Automatic Reply
Date: November 3, 2003 - 9:07 a.m.

I will be out of the office for the next two weeks. In my absence, please direct any concerns to Betty Pantow.

* * * * *

* Professor of Law, Nova Southeastern University (jarvisb@nsu.law.nova.edu).

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To: Betty Pantow
From: Quentin Pomerantz
Re: Faculty Fax Machine
Date: November 3, 2003 - 9:12 a.m.

B - I understand that you're covering for Lisa while she's out. The faculty fax machine is broken again and I was wondering if you could get someone in to fix it.

Thanks,

Q.

* * * * *

To: Quentin Pomerantz
From: Betty Pantow
Re: Faculty Fax Machine
Date: November 3, 2003 - 11:31 a.m.

Prof. P:

Jane-Marie handles service calls - I'll let her know when I see her - she took an early lunch.

Betty

* * * * *

To: Betty Pantow
From: Quentin Pomerantz
Re: Faculty Fax Machine
Date: November 3, 2003 - 2:34 p.m.

B - Did you have a chance to talk to Jane-Marie about the fax machine?

Thanks,

Q.

* * * * *

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ONE FINE NOVEMBER

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To: Quentin Pomerantz
From: Betty Pantow
Re: Faculty Fax Machine
Date: November 5, 2003 - 3:15 p.m.

Prof. P:

I left her a note a couple of days ago – I'll ask her to e-mail you.

Betty

* * * * *

To: Quentin Pomerantz
From: Jane-Marie Silverlow
Re: Faculty Coffee Machine
Date: November 6, 2003 - 10:13 a.m.

Hi Prof - Betty told me that you were having trouble with the coffee machine, but I just made myself an espresso and it worked great. So I think everything is okay.

JM

* * * * *

To: Jane-Marie Silverlow
From: Quentin Pomerantz
Re: Faculty Coffee Machine
Date: November 6, 2003 - 10:16 a.m.

JM - Actually, I was trying to get the fax machine to work (but I'm glad to hear the coffee machine is working).

Q.

* * * * *

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To: Quentin Pomerantz
From: Jane-Marie Silverlow
Re: Faculty Coffee Machine
Date: November 6, 2003 - 2:00 p.m.

Hi Prof - You need to push the green button on the fax machine - on the coffee machine, it's the red button (I always get those two confused).

JM

* * * * *

To: Jane-Marie Silverlow
From: Quentin Pomerantz
Re: Faculty Coffee Machine
Date: November 6, 2003 - 2:06 p.m.

JM - Yes, I know about the green button (but you're right - it can be tricky). Actually, the fax machine is not working at all and I was hoping you could put in a service call.

Q.

* * * * *

To: Quentin Pomerantz
From: Jane-Marie Silverlow
Re: Faculty Coffee Machine
Date: November 6, 2003 - 4:17 p.m.

Oh, I haven't handled service calls since Rhoda left. Velma in the library is in charge of service calls.

JM

* * * * *

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ONE FINE NOVEMBER

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To: Velma Flinmeister
From: Quentin Pomerantz
Re: Faculty Fax Machine
Date: November 7, 2003 - 9:26 a.m.

V - I understand that you are in charge of service calls. The faculty fax machine has been broken since Saturday. Could you please have someone come look at it?

Thanks,

Q.

* * * * *

To: Quentin Pomerantz
From: Velma Flinmeister
Re: Faculty Fax Machine
Date: November 10, 2003 - 7:44 a.m.

Dear Prof. Pomerantz:

Sorry I didn't respond to your e-mail on Friday - I took a personal day. We no longer have a service contract for that machine. But I'll ask Marty in the A/V Dep't to take a look at it.

Velma

* * * * *

To: Quentin Pomerantz
From: Martin Lasker
Re: Faculty Fax Machine
Date: November 11, 2003 - 1:32 p.m.

Professor P.: Velma told me you're having a problem operating the faculty fax machine. You have to push the green button to get it to send (it's right next to the on/off switch on the side).

-- Marty

* * * * *

To: Martin Lasker
From: Quentin Pomerantz
Re: Faculty Fax Machine
Date: November 11, 2003 - 1:34 p.m.

M - Thanks, I know about the green button. But the problem is, the machine's broken.

Q.

* * * * *

To: Quentin Pomerantz
From: Martin Lasker
Re: Faculty Fax Machine
Date: November 12, 2003 - 11:01 a.m.

Professor P.: Have you put in a service call?

-- Marty

* * * * *

To: Sandra LeBeau
From: Quentin Pomerantz
Re: Faculty Fax Machine
Date: November 12, 2003 - 3:56 p.m.

S - The faculty fax machine has been broken for nearly two weeks, and I'm told that we no longer have a service contract for it (I guess because it's so old). We really need a fax machine ASAP. Any chance we can go buy one?

Q.

* * * * *

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ONE FINE NOVEMBER

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To: Quentin Pomerantz
From: Sandra LeBeau
Re: Faculty Fax Machine
Date: November 13, 2003 - 8:23 a.m.

Quentin: The Dean and I were just talking about what we should ask for from the Central Administration in next year's budget. He's currently on a fund-raising trip but I'll definitely recommend that this be looked into when he gets back.

Thanks for the suggestion,

Sandra LeBeau
Business Manager
EOSU Law School

* * * * *

To: Faculty
From: Quentin T. Pomerantz
Re: Faculty Fax Machine
Date: November 13, 2003 - 10:14 a.m.

Friends: For the past two weeks (give or take), the faculty fax machine has been out of order. I've tried to get it repaired or replaced but haven't had any luck. I think we should demand a new machine at next month's faculty meeting. What do you think?

Q.

* * * * *

To: Quentin T. Pomerantz
cc: Faculty
From: Diana Morris
Re: Faculty Fax Machine
Date: November 13, 2003 - 10:19 a.m.

Have you put in a service call?

* * * * *

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To: Quentin Pomerantz
cc: Faculty
From: Richard Hightower
Re: Faculty Fax Machine
Date: November 13, 2003 - 10:22 a.m.

Q - You have to push the green button – it's tricky.

-- Rich

* * * * *

To: Quentin Pomerantz
cc: Faculty
From: Rachel Val-Krugel
Re: Faculty Fax Machine
Date: November 13, 2003 - 10:23 a.m.

Quent: Talk to Betty – she's in charge of service calls.

* * * * *

To: Quentin Pomerantz
cc: Faculty
From: Bob McArthur
Re: Faculty Fax Machine
Date: November 13, 2003 - 10:25 a.m.

While we're at it, how about a new microwave for the faculty kitchen - the current one is pretty gross!

B.

* * * * *

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ONE FINE NOVEMBER

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To: Quentin Pomerantz
cc: Faculty
From: Joe Featherstock
Re: Faculty Microwave
Date: November 13, 2003 - 10:27 a.m.

I just got a Whirlpool 6600 at home - works great. Can make a 20 pound turkey in under 10 minutes - truly awesome.

-- Joe F.

* * * * *

To: Quentin T. Pomerantz
cc: Faculty
From: Elizabeth Shoemaker
Re: Thanksgiving (Was Faculty Microwave)
Date: November 13, 2003 - 10:32 a.m.

Speaking of turkey, does anyone have a good, fat-free gravy recipe? My in-laws are coming over this year and they're both on calorie-restricted diets.

Lizzy

* * * * *

To: Elizabeth Shoemaker
cc: Faculty
From: Sam Willmot
Re: Turkey Gravy Recipe
Date: November 13, 2003 - 10:34 a.m.

E – I've got a great recipe. You take two cups flour (preferably brown) and one cup water, add a pinch of nutmeg, and bring to a boil. Serves 4.

* * * * *

To: Faculty
From: Nancy Holt-Franken
Re: Holiday Party?
Date: November 13, 2003 - 10:37 a.m.

Hey guys - Sam's recipe sounds great. Why don't we cancel next month's Faculty meeting and have a pot luck Holidays get-together? We could all show off our favorite recipes!

Nancy

* * * * *

To: Nancy Holt-Franken
cc: Faculty
From: Harold Gunderson
Re: Holiday Party?
Date: November 13, 2003 - 10:41 a.m.

N - Terrific idea! Anyone who wants to help plan next month's Holiday Party, let's meet for lunch at 12:15 p.m. at Ciero's. This is going to be fun!!

HG

* * * * *

To: Harold Gunderson
cc: Faculty
From: Alice Potterson
Re: Holiday Party?
Date: November 13, 2003 - 10:44 a.m.

Count me in - I make a mean cheese casserole.

* * * * *

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ONE FINE NOVEMBER

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To: Faculty
From: Cy Snodgrass
Re: Quentin Pomerantz
Date: November 19, 2003 - 9:59 a.m.

Colleagues:

Upon my return today from my fund-raising trip I learned that we have a new faculty fax machine. Many thanks to Quentin, who generously donated it to the law school. It's this kind of spirit that makes EOSL the great place it is. Keep up the good work!

Cyril J. Snodgrass
Dean
East Overshoe State University Law School
"Preparing Tomorrow's Leaders Today"

* * * * *

A Public View of Attorney Discipline in Florida:
Statistics, Commentary, and Analysis of Disciplinary
Actions Against Licensed Attorneys in the State of
Florida From 1988-2002

*Debra Moss Curtis
Billie Jo Kaufman*

The Technology Challenge: Lawyers Have Finally
Entered the Race But Will Ethical Hurdles Slow the Pace?

Lynn A. Epstein

Uniform Transfers to Minors Act Accounts—Progress,
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A Tax Professor's Journey into Law and Popular Culture

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ASIDES

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One Fine November

Robert M. Jarvis

